COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS

1989

Manitoba
Labour Board

MG-14005

92-01763/

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__Note__: In the following headnotes, the term "Board" refers to a three member arbitration panel, while the term "arbitrator" refers to a single arbitrator. The term "Board" should not be confused with The Manitoba Labour Board.

FILE NO. AA86-02-007

EMPLOYER: Victoria General Hospital

UNION: Manitoba Government Employees' Association

BOARD: S.G. Sigurdson, Q.C., Chairperson
G. Parkinson, Nominee for the Employer
R. Dheilly, Nominee for the Union

APPEARANCES: W.S. Gardner, for the Employer
W. Comstock, for the Union

ISSUES: 1. Senior Employee with the Required Ability 6:3210
2. Education and Experience 6:3320

DECISION RENDERED: February 24, 1986

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor applied for, but was denied, the position of Chief Engineer. The Union filed a grievance alleging that the Employer violated Article 4.02 of the collective agreement, because the position had been awarded to a person outside the bargaining unit, while the Grievor possessed the necessary qualifications and seniority.

The Employer argued that the Grievor lacked the posted qualifications for a Second Class Power Engineer certificate, and the formal management preparation and demonstrated leadership skills. The Union countered that while the Grievor did not technically have the certificate, he was expected to obtain it shortly after the closing date of the posting. As well, it disputed the need for experience as a Second Class Engineer arguing that the Grievor's experience in a healthcare setting was sufficient. It also pointed to the language of the posting which described the formal management preparation and the leadership skills as "assets" and not as requirements.

AWARD: The grievance was denied. The Board found that the requirement for the certificate was reasonable. It also could not find any arbitral authority or contractual obligation to oblige the Employer to grant an employee an extension of time to perfect his qualifications in the face of time limits set out in the job posting. As well, the Employer could attach no degree of certainty to the Grievor's passing due to his past failures. Therefore, the Board ruled that because the Grievor did not possess a certificate at the date of posting or the date the grievance was filed, he was not entitled to the position. It found no need to consider if he met the other qualifications.

DISSENT: R. Dheilly, Nominee for the Union. Mr. Dheilly agreed with the Board's decision. However, he wanted to comment that he concurred with the Union's argument regarding the word "asset", and would have awarded the position to the Grievor had he possessed the necessary certificate.

FILE NO. AA86-07-004

EMPLOYER: The Snow Lake School District, No. 2309

UNION: Snow Lake Teacher's Association, No. 45-4
of the Manitoba Teachers' Society

BOARD: J.M. Scurfield, Chairperson
G.D. Parkinson, Nominee for the Employer
D. Shrom, Nominee for the Union

APPEARANCES: R. Simpson, for the Employer
M. Myers, for the Union

ISSUES: 1. Changes in Job Function 5:2410
2. Estoppel 2:2200

DECISION RENDERED: July 3, 1986

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The teachers were required by a school board resolution to provide supervision to students during the noon hour. The Union filed a grievance claiming that the collective agreement did not establish a legal obligation for the teachers to provide the supervision. It submitted that although under Form 2 of **The Public Schools Act** the teachers were conferred with broader duties other than classroom teaching, those additional duties had to be related to the teaching function.

The Employer responded that it viewed the duty as an obligation of the teachers. It submitted that past practice had included the provision of noon hour supervisory services since 1981 and it argued that the teachers were precluded from taking the position that the services were voluntary.

AWARD: The grievance was allowed. The Board was not satisfied that past practice created a permanent form of estoppel. It found that neither the Act, the collective agreement, nor logic required the teachers to be permanently bound to provide the noon hour supervision on a voluntary basis.

FILE NO. AA87-12-007

EMPLOYER: Tupperware Company

UNION: United Food & Commercial Workers, Local 111

BOARD: W.D. Hamilton, Chairperson
E.W. Olson, Q.C., Nominee for the Employer
W. Armstrong, for the Union

APPEARANCES: G.D. Parkinson, for the Employer
C. Trigwell, for the Union

ISSUES:
1. Temporary,Casual and Part-time Employees 5:1124
2. Lay-off 6:2200
3. Seniority: Acquisition and Termination 6:1000
4. Entitlement to Wages 8:1000
5. Unjust Discharge or Suspension 2:1421
6. Compliance with the Grievance Procedure 2:3120
7. Section 121(1) of **The Labour Relations Act**

DECISION RENDERED: December 14, 1987

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: As per Article 19 of a newly ratified collective agreement, "each employee" was to receive a wage increase, and each "permanent, non-probationary, full-time employee" was to be paid a signing bonus. When the Grievors, who were hired on a temporary basis to perform general warehouse duty and to dispose of obsolete inventory, did not receive the raise nor the signing bonus, they filed a grievance. Seven hours later, they were advised that their employment would be terminated at the end of the week because no more work was available. The Union filed grievances alleging that the Grievors were unjustly discharged or were unjustly laid off as a result of the grievances they had filed. It argued that the Grievors were no longer temporary employees because, having completed the probationary period, they were full-time permanent employees and were entitled to the raise and bonus. The Employer stated that when the original grievances were filed it was reminded of the temporary nature of the Grievors' employment, and the decision to lay them off was based only upon an examination of the workload. It also requested that the Board pay heed to the wording of the grievances because the initial grievances had never been pursued beyond the initial step of the Grievance Procedure.

AWARD: The grievances were allowed in part. The Board could not accept that the signing bonus/raise issue was defunct because the decision to lay off the Grievors overshadowed the initial grievances and they did not proceed in that form. However, the grievances filed still claimed the signing bonuses and raises. As to the merits, the Board found that the Grievors had completed their probationary periods as of the date of the new agreement and were employees with seniority rights. Further, it found that because work was not available and because they were the most junior warehouse employees, the Grievors were laid off for bona fide reasons, and were not discharged as claimed by the Union. It ruled that they retained their seniority status for purposes of recall for a period equal to their term of employment and within the departmental job classification they occupied. It also found that the Grievors were entitled to the wage increase as "each [was an] employee", but they were not entitled to the signing bonus as they were not "permanent" employees. Therefore, it ordered that the parties resolve whether or not any positions were available within 4 months and 1 week from the date of lay-off to which the Grievors ought to have been recalled, and ordered the Employer to pay the Grievors the appropriate wage increase from the ratification date to their last day of employment.

DISSENT: E.W. Olson, Nominee of the Employer. Mr. Olson felt that the Board had reshaped the substance of the grievance. Because the grievances stated that the Grievors believed they were laid off because they filed another grievance and wanted to be reinstated, the Board should have only dealt with the motivation behind the lay-offs. As well, he disagreed with the Board's logic in the conversion of term employees to permanent even if the probationary period expired. He would have found that the Grievors were not laid off, but that their term of employment ended and they no longer had employee status. Therefore, they had no recall rights. He was also concerned with the Board reserving jurisdiction to resolve the issue of recall rights as no notice was given of the issue being potentially determined at the hearing, and therefore it was not properly before the Board.

FILE NO. AA89-01-001

EMPLOYER: Bristol Aerospace Ltd.

UNION: Canadian Association of Industrial, Mechanical, and Allied Workers, Local 5

ARBITRATOR: G. Reid

APPEARANCES: G.D. Parkinson, for the Employer
S. Soronow, for the Union

ISSUES:
1. Procedural Requirements and the Power to Discipline 7:2100
2. The Nature of Disciplinary Sanctions 7:4210

DECISION RENDERED: January 5, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, a Sheet Metal Assembler, received an unfavorable comment on a merit review. While attempting to arrange a meeting with management regarding the review, she was told that she could not bring a Union representative to the meeting. When she attempted to do so, the management representative refused to discuss her concerns with the shop steward present. The Union argued that this action violated the terms of the collective agreement. It emphasized that the collective agreement provided that a Union representative could be present during a meeting with management regarding a dispute. The Union argued that past practice had been to allow Union personnel to sit in on such preliminary meetings if the employee desired.

The Employer contended that a meeting to discuss a merit review did not qualify as a grievance. The Employer noted that the management representative offered to schedule another meeting to deal with any grievance that might have emerged from the first meeting.

AWARD: The grievance was allowed. The Arbitrator held that a Union representative was entitled to be present during a meeting to discuss concerns regarding merit reviews. The fact that the Grievor disagreed with the contents of the merit review demonstrated that she felt a dispute had arisen. The negative performance appraisal, while of a minor nature, could be construed as a disciplinary act, thus entitling an employee to have a Union representative present in any meeting.

FILE NO. AA89-01-002

EMPLOYER: Health Sciences Centre

UNION: Manitoba Association of Health Care Professionals

ARBITRATOR: J. Atwell

APPEARANCES: W.S. Gardner, for the Employer
T. Loewen, for the Union

ISSUES: 1. Seniority: The Scope of Arbitral Review 6:3100
2. Senior Employee if Relatively Equal 6:3220
3. Education and Experience 6:3320
4. Section 80 & 87.2 of The Labour Relations Act

DECISION RENDERED: January 10, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, a General Duty Technologist, applied for, but was denied, the position of Area Supervisor which was awarded to an external candidate. The Union filed a grievance alleging that the Employer had violated the terms of the collective agreement in its hiring procedure, because it was prevented from considering external candidates until all employees in the bargaining unit had a chance to apply for the vacant position. It asserted that the Grievor should have been awarded the position as she had served as acting Area Supervisor, and was the most senior applicant. In addition, it contended that there were procedural irregularities in the selection process. It also questioned the selection criteria, because they were not formulated by persons in the department; some of the factors considered were irrelevant; and, the proper weighting was not given to all factors. Specifically, it was claimed that too much emphasis was placed on education and not enough on experience.

The Employer submitted that the hiring provision in the collective agreement was a competition clause with seniority serving as a tie breaker only and the candidates were not equal. Furthermore, it argued that the criteria employed and the weighting assigned to the relevant factors conformed to the requirements of the collective agreement and accurately reflected the requirements of the job.

AWARD: The grievance was allowed. The Arbitrator found that the entire hiring process was flawed, because the two members of the selection committee did not co-ordinate their approaches, the scoring of the candidates was not consistent, the candidates were interviewed by only one member of the selection committee, and the relevance of some of the requirements for the position was not demonstrated. As well, the Arbitrator found that the Grievor was not given proper credit for her experience. The Employer was ordered to reassess the candidates and review the guidelines for selection. In making the above criticisms, the Arbitrator noted that many of the problems could have been avoided if the hiring guidelines, which had been formulated elsewhere, were adapted to fit the specific needs of the department in question.

FILE NO. AA89-01-003

EMPLOYER: Tupperware Co.

UNION: United Food and Commercial Workers, Local 111

ARBITRATOR: W.D. Hamilton

APPEARANCES: G.D. Parkinson, for the Employer
C. Trigwell, for the Union

ISSUES:
1. Exhaustion of Jurisdiction 2:4000
2. Seniority: Rights of Recall 6:2354
3. Functus Officio 1:5600
4. Abandonment, Settlement and Withdrawal 2:3230
5. Sec. 121(2) & (4) of The Labour Relations Act

DECISION RENDERED: January 12, 1989 (Previous Award - Dec. 14, 1987)

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: In a previous award, dated December 14, 1987, the Board determined that the Grievors, who were temporary warehouse workers, had acquired seniority benefits, specifically recall rights. It ordered the parties to determine whether or not "any work became available within the departmental job classification the Grievors occupied." During the relevant time frame, five jobs became available, but only one was within the same department and classification of the Grievors. The Union contended that the Grievors were entitled to be recalled to any job that became available which he/she had the basic ability to perform following a minimal training as per Article 7 of the collective agreement, which dealt with seniority rights. It argued that any statements made in the previous award on the substantive operation of the seniority clause was "obiter" and not conclusive because the clause was not fully argued in the main case. The Employer admitted that the most senior Grievor was entitled to be paid wages for the period when the warehouse job became available until the time when he accepted employment elsewhere. In addition, it stated that the Arbitrator was "functus" because the Union was requesting that he reconsider the previous award and change a substantive finding of the Board that recall rights were to be determined strictly with reference to the job classifications.

AWARD: The grievance was allowed in part. The Arbitrator noted that the Board was required and did address all of Article 7 when considering the remedial relief outlined in the previous award. The findings were specific and the reservation of jurisdiction focused on issues of compensation, and therefore, he agreed he was functus. In any event, he noted that the collective agreement allowed employees with greater seniority to be assigned work across classifications at the time of lay-off. However, the Arbitrator stressed that the Grievors were already laid off and, in any case, because they were the most junior did not possess any bumping rights. In making his decision, the Arbitrator affirmed the Employer's interpretation of the collective agreement, stating that employees could be recalled only within their own classification. The Arbitrator ruled that the most senior of the Grievors deserved to be paid from the time that the vacancy in the warehouse occurred until he began work with another employer.

FILE NO. AA89-01-004

EMPLOYER: Coldstream Products of Canada Ltd.

UNION: Canadian Association of Industrial, Mechanical and Allied Workers

BOARD: D.G. Baizley, Chairperson
V. Pichin, Nominee for the Employer
R. McGregor, Nominee for the Union

APPEARANCES: R. Roy, for the Employer
S. Spratt/P. McEvoy, for the Union

ISSUES:
1. Seniority: Lay-off 6:2200
2. Compensation: Call-in Pay 8:3400
3. Purpose and Entitlement 8:3410
4. Employee Disability 7:3200

DECISION RENDERED: January 13, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who performed simple assembly work, suffered from Down's Syndrome and had limited capabilities. Due to a mechanical breakdown, the Grievor was unable to perform his regular duties. The Grievor was sent home before his shift ended and was paid for the three remaining hours in his shift. He was laid off for two days until the machine was repaired. The Union filed a grievance alleging that the Grievor was not recalled as per the collective agreement. It argued that, because of the Grievor's seniority, the Employer was obligated to find alternate work. If there was no work available, the Union held that the call-in provisions of the collective agreement entitled the Grievor to five extra hours of call-in pay because of the work stoppage. The Employer argued that the Grievor was properly laid off as he was incapable of performing any other tasks because of his disability.

AWARD: The grievance was denied. The Board found that, despite the Grievor's seniority, the Employer had no obligation to keep him on the job because there were no other jobs that he could safely or effectively perform. Furthermore, the article in question dealt only with foreseeable reductions in the workforce. In the present case, the mechanical breakdown was unanticipated. In rejecting the Union's interpretation of the call-in rule, the Board ruled that wages were properly paid for the lost hours in the Grievor's shift, and that the call-in provisions were not applicable because notice had been given.

DISSENT: R. McGregor, Nominee for the Union. Reasons not included.

FILE NO. AA89-01-005

EMPLOYER: Bristol Aerospace Ltd.

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local 5

BOARD: M.J. Smith, Chairperson
P. Fussey/N. Richards, Nominees for the Employer
H. Rice/P. Bonneau, Nominees for the Union

APPEARANCES: Not Stated

ISSUES: 1. Criteria: Equal Work or Equal Skill 5:2420
2. Changes in Job Function 5:2410

DECISION RENDERED: January 16, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Union filed a grievance claiming that the Grievor, who was classified as a Welder-Inert Gas, was regularly performing the work of a Welder-General and sought reclassification. It argued that the Grievor possessed the necessary qualifications for the job of Welder-General and performed the same kinds of duties as other employees classified as Welders-General. Evidence adduced at the hearing also revealed that the Grievor was involved in the most difficult type of welding at the plant. The Employer submitted that to be classified as a Welder-General, the Grievor must perform all varieties of welding listed in the job description. It suggested that all of the workers classified as Welder-General were improperly classified.

AWARD: The grievance was allowed. The Board emphasized that the job classifications contained in the collective agreement were of little utility as they were incomplete and outdated, with technological advances rendering some of the functions listed obsolete. Therefore, due to the outdated job classifications, the case was decided on an individual basis with the Board considering the variety, complexity and skill levels required in the assignments regularly performed by the Grievor. It found that the other workers in the higher classification possessed the same qualifications and performed similar functions as the Grievor. As a result, it ruled that the work performed by the Grievor regularly fell within the higher classification and order that he be reclassified.

DISSENT: P. Fussey/N. Richards, Nominees for the Employer. Reasons not included.

FILE NO. AA89-01-006

EMPLOYER: City of Winnipeg

UNION: Canadian Union of Public Employees, Local 500

ARBITRATOR: D.E. Bowman, Q.C.

APPEARANCES: M. Samphir/M. Cavett, for the Employer
R. Tonn/D. Kohuch, for the Union

ISSUES:
1. Jurisdiction of the Arbitrator: Missed Overtime Opportunities 2:1423
2. Abandonment, Settlement and Withdrawal 2:3230
3. Overtime 8:2100

DECISION RENDERED: January 17, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor had successfully grieved a transfer between facilities. After the grievance was allowed it was discovered that, during his absence, a great deal of overtime had been available at the Grievor's original place of work. Because the Grievor had been wrongly transferred, he did not have the opportunity to take on some of this overtime work. As compensation, the parties met and determined that 171 straight time hours would be made available to the Grievor at times mutually agreeable to both parties. Between March and December 1987, the Grievor managed to make up all but 23 of the hours to which he was entitled. The Employer was not pleased with the Grievor's slow progress in working the hours off and informed him that all hours would have to be worked by December 31, 1987 or it would not provide the opportunity to work off the remaining 23 hours. After a long period, no further work was offered by the Employer and the Union sought monetary compensation for the missing 23 hours. It argued that a reasonable period of time to supply the overtime hours should not have exceeded one year. It alleged that the Employer had breached its promise to provide the required overtime work and suggested that the Arbitrator had the power to order compensation to be paid to the Grievor.

The Employer said that no discussions were held regarding time limits on when overtime would be made available. It submitted that part of the blame for the delay was due to the Grievor's refusal to accept overtime in certain instances.

AWARD: The grievance was allowed in part. The Arbitrator held that a reasonable amount of time had elapsed and that the Grievor should have been able to extinguish the hours owed if the Employer had made efforts to provide the work required by the settlement. In rejecting the Employer's argument that the Grievor was responsible because he did not accept all hours offered, the Arbitrator noted that the settlement required that the hours be "mutually agreeable". He ruled that he had jurisdiction to resolve the matter and that the Grievor was entitled to more than a mere declaratory award. Therefore, he ruled that the Grievor should be compensated for ten hours of straight time pay.

FILE NO. AA89-01-007

EMPLOYER: Hydro Projects Management Association

UNION: Allied Hydro Council of Manitoba, and
International Union of Operating Engineers, L. 901

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: G.D. Parkinson, for the Employer
R. Tonn, for the Union

ISSUES:
1. Arbitrability: Parties 2:3110
2. Employee Defined 5:1122
3. Procedural Requirements 5:2500
4. Union Security 9:1200
5. Section 80 of The Labour Relations Act

DECISION RENDERED: January 20, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Employer had placed an order with Canada Employment for a Bridge Crane Operator who possessed a hoisting certificate. Upon being notified of this request by Canada Employment, the Union referred a member to the Employer who was not hired. As a result, it filed a policy grievance alleging that the Employer violated the collective agreement and Section 80 of The Labour Relations Act, because the collective agreement in force created a contractual link, requiring the Employer to hire Union referrals. The Union held that the individual not hired was qualified for the job and that the hoisting certificate was unnecessary and unreasonable.

The Employer argued that the hoisting certificate was a legitimate requirement. As well, the Employer stated that it was under no obligation to hire any worker referred to it by the Union as the collective agreement in force at the time bore no relation to a hiring hall agreement. Further, the Employer suggested that the Arbitrator had no jurisdiction to hear the case as the person referred was never an employee and not covered by the collective agreement and thus not entitled to remedies through the arbitration process.

AWARD: The grievance was denied. The Arbitrator found the hoisting requirement to be reasonable given the complexity of the job and value of the material to be moved. As well, he found that the collective agreement was not a hiring hall agreement, leaving the Employer with discretion in its hiring practices. Because the Employer was not obliged to hire the individual referred by the Union, and he was not an employee, he was therefore beyond the scope of the collective agreement. As a result, the Arbitrator stated he did not have the jurisdiction to deal specifically with the matter as it pertained to that individual. Nevertheless, he stated that he would have found that the refusal to hire was not arbitrary as the individual referred had no recent experience.

FILE NO. AA89-01-008

EMPLOYER: Liquor Control Commission of Manitoba
UNION: Manitoba Government Employees' Association
ARBITRATOR: J.M. Chapman, Q.C.
APPEARANCES: V. Rachliss, for the Employer
P. Joyce, for the Union
ISSUES: 1. Criteria Equal Work or Equal Skill 5:2420
2. Changes in Job Function 5:2410
DECISION RENDERED: January 22, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who was classified as a Clerk 4, stated that his current job description was out of date. He claimed that the complexity and responsibility of his position had expanded to cover new areas not listed in the job description. The Grievor took the view that his duties better fit within the higher classification of Clerk 6 and sought reclassification. Upon review, the Employer recommended that the Grievor be promoted to the rank of Clerk 5. The Union filed a grievance claiming that the Employer had failed to give the proper classification to the job. It submitted that although certain parts of the Clerk 5 position were applicable to the Grievor's job, there was an overlap into the Clerk 6 position. It noted that the job description stated that the Clerk 5 position was largely clerical. However, less than 40% of the Grievor's time was spent on clerical duties, and his work was largely unstructured. The Union emphasized that only the Clerk 6 position required public interaction, and the Grievor was required to deal with the public on a daily basis. As well, the Grievor was required to take university courses to perform some of his duties, something no other classification required.

The Employer stressed that the Grievor had no supervisory duties and that his position was not completely unstructured. It emphasized that the Grievor was not ultimately responsible for his decisions. All of these points, the Employer argued, were in the Clerk 6 job description. The Employer also suggested that the Grievor did not perform functions of the same quality or responsibility as other Clerk 6 workers.

AWARD: The grievance was allowed. The Arbitrator found that the Grievor's duties encompassed a much higher level of work and responsibility than contemplated by the Clerk 5 position, and therefore, better fit within the Clerk 6 description. In so ruling, the Arbitrator stressed the non-routine nature and public relations requirements of the Grievor's position, both of which were essential characteristics of the Clerk 6 classification. Therefore, he held that the Grievor was entitled to be classified as a Clerk 6 as of the date he was reclassified to a Clerk 5.

FILE NO. AA89-01-009

EMPLOYER: Rural Municipality of Lac du Bonnet
UNION: International Union of Operating Engineers, Hoisting and Portable, Local 901
ARBITRATOR: M.H. Freedman, Q.C.
APPEARANCES: J. Palamar, for the Employer
R. Tonn, for the Union
ISSUES: 1. Senior Employee if Relatively Equal 6:3220
2. Rights of Recall: 6:2354
3. Temporary, Casual and Part-time Employees 5:1124
DECISION RENDERED: January 23, 1989
EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who had worked as seasonal backhoe operator for three summers, was replaced by a new worker with no seniority. The Union filed a grievance alleging that the Employer had violated the recall provisions of the collective agreement which provided that seniority was to be the governing factor in the case of a lay-off or recall. The Union argued that the Grievor possessed considerable experience, having worked for fifteen years with heavy equipment, and had previously used the Employer's equipment. It submitted that the Grievor's work was of a better quality than that of the successful candidate. The Union also submitted that the collective agreement did not allow the Employer to interview other candidates until it had considered all employees with seniority.

The Employer contended that the successful candidate was hired because he was a backhoe specialist, and it had been impressed by work that he had done earlier. As well, it stated that he was more skilled, more knowledgable and more reliable than the Grievor. In addition, it remarked that it was not completely satisfied with the Grievor's performance although those concerns were never communicated to the Grievor.

AWARD: The grievance was allowed. The Arbitrator found that the evidence submitted at the hearing showed that the knowledge, skill and ability of the Grievor were, at the least, equal to that of the successful candidate. Noting that the provisions of the collective agreement were clear on the question of seniority, the Arbitrator ruled that the Grievor should have been rehired by the Employer.

FILE NO. AA89-01-010

EMPLOYER: Health Sciences Centre

UNION: Manitoba Paramedical Association

BOARD: J.M. Chapman, Q.C., Chairperson
M. Werier, Nominee for the Employer
J. Peterson, Nominee for the Union

APPEARANCES: W.S. Gardner, for the Employer
P.S. Teskey, for the Union

ISSUES:
1. Senior Employee if Relatively Equal 6:3220
2. Education and Experience 6:3320
3. Job Posting 5:2520

DECISION RENDERED: January 25, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, a Laboratory Technician I (Hematology), applied for, but was denied, the position of Technologist I (Histology) which was awarded to an applicant from outside the bargaining unit. The Union filed a grievance alleging that the Employer had violated the provisions of the collective agreement in its posting of the job and in the actual selection process. It argued that the Grievor met all of the minimum requirements for the position and was denied the job only because he did not have experience in the field of histology. However, it emphasized that, since the job description stated that "experience in histology [was] preferred", it was not a requirement. Nevertheless, if experience was a requirement, the Union suggested that the Grievor's duties in the hematology lab gave him the necessary experience. However, the Union was of the view that the experience requirement was an improper standard as the Technologist I position was an entry level job.

The Employer admitted that the Grievor met the minimum qualifications for the position. However, it claimed that the successful applicant, who had extensive experience in the field, was a more suitable candidate. It also argued that the relevant provision in the collective agreement was a competitive clause, entitling the Employer to choose the candidate with the "preferred experience".

AWARD: The grievance was denied. The Board stated that because this was a competitive clause situation, the Employer was not barred from stating a preference. It held that, in this case, experience in the field was a demonstrably justified preference. Therefore, it found that the Grievor was not "relatively equal" to the external candidate, and ruled he was not entitled to the position.

DISSENT: J. Peterson, Nominee for the Union. Mr. Peterson found that, while experience was listed as a preference, the selection committee treated it as a requirement. He also suggested that too much weight was accorded to experience for an entry level position. He would have ruled that the Grievor was entitled to the position as he was relatively equal to the successful candidate when the basic requirements of the job were considered. As well, he found that, as per the collective agreement, the Employer could not express a preference in a specific discipline.

FILE NO. AA89-01-011

EMPLOYER: City of Winnipeg
UNION: Amalgamated Transit Union, Local 1505
ARBITRATOR: M.H. Freedman, Q.C.
APPEARANCES: M. Samphir/M. Cavett, for the Employer
M. Myers/L. Diamond, for the Union
ISSUES: 1. Jurisdiction: Duty to Mitigate 2:1412
2. Damages 2:1410
DECISION RENDERED: January 31, 1989 (Previous Award - July 8, 1988)
EXPEDITED ARBITRATION: No

CIRCUMSTANCES: This Award resulted from an earlier decision of the Arbitrator in which he found that the Grievor had been improperly dismissed. He had been unemployed for 255 days, and sought $16,007.44, which was the difference between the wages owed and Unemployment Insurance benefits received. The Employer denied the Grievor's claim, because, while he was off work, he had rejected two job offers it had made to him. As the parties were unable to agree on a compensation package for the wages owing to the Grievor, the matter was referred to the Arbitrator.

The Union argued that the Grievor was under no obligation to accept any position from the Employer. It pointed out that the Grievor received more money on Unemployment Insurance than he would have at the jobs offered by the Employer. In rejecting the positions, the Grievor expressed his reluctance to lower his standard of living merely to remain employed.

The Employer explained that the jobs offered had pay increments which would eventually have paid the Grievor more than Unemployment Insurance. It also suggested that he did not make sufficient attempts to secure other employment. As well, the Employer argued that if it accepted the Grievor's claim, it would be doubly injured because when he refused to accept the work offered, it had to hire and pay someone else to perform his duties, and therefore, it would be compensating two people for the same job.

AWARD: The grievance was allowed. The Arbitrator ruled that an employee is not obliged, without limitation, to accept any employment offered in order to mitigate his losses. He found that the Grievor logically elected to remain on the higher paying Unemployment Insurance program. The Arbitrator ruled that the Employer failed to demonstrate that the Grievor could reasonably have avoided the loss which he claimed, and ordered it to pay the compensation requested.

FILE NO. AA89-01-012

EMPLOYER: City of Winnipeg
UNION: United Fire Fighters of Winnipeg, Local 867
BOARD: J.M. Chapman, Q.C., Chairperson
G.D. Parkinson, Nominee for the Employer
M. Myers, Q.C., Nominee for the Union
APPEARANCES: M. Samphir, for the Employer
P.S. Teskey/N. Anderson, for the Union
ISSUE: 1. Interest Arbitration 1:0000
DECISION RENDERED: January 31, 1989
EXPEDITED ARBITRATION: No

CIRCUMSTANCES: When the parties failed to agree on all the terms of a new collective agreement, the matter was referred to arbitration under authority of The Fire Departments Arbitration Act. Before the outstanding issues were addressed, the Union requested an interim salary Award which was granted on November 15, 1988.

AWARD: The Board denied the Union's request for wage parity with the Winnipeg Police Department as it sought to maintain the historical wage relationship with the Police while trying to narrow the gap as quickly as possible. The Board would not consider the Union's alternate request to grant parity with the higher paid fire departments in other jurisdictions, because the comparisons of the wages would be difficult without a detailed examination of other collective agreements and due to the differences between the provincial legislations. It approved a salary rate increase of 7.29% over two years.

The Board denied the Union's request for an increase in the night shift premium totalling 4% of a First Class Fire Fighter's hourly rate. However, the premium was increased by 5 cents per hour in the second year of the collective agreement.

The Board did not adopt the Union's proposed changes to the Group Life Insurance Plan, which would provide members, at retirement, with a paid-up policy equalling one times the annual salary. It noted that only one other jurisdiction granted such a paid-up policy benefit, and, in that case, only in the amount of $2000.

The Union request for changes to the Dental Plan was dismissed. The Board ruled that the rates should not automatically be adjusted to reflect changing rates. However, the Board accepted its Vision Care proposal noting that the same benefit was granted to other bargaining units.

The Board refused the Employer's request that Article 9 be amended to place emphasis on merit rather than seniority when considering promotions. As no evidence was presented that the existing agreement caused hardship or difficulty, the Board determined that changes were not justified.

The Board found that the Employer's proposed changes to the calculation of interest on retroactive wage awards served the interests of both parties by avoiding the possibility that either party would receive an advantage over the other resulting from time delays. However, it modified the wording of the suggested clause.

The Employer's suggested changes to the sick pay provisions which would allow for sick leave credits used to be debited against credits last earned were denied. The Board refused to overturn a decision issued by a previous Board unless it could be shown that the existing provision was unjust or inequitable.

DISSENT: M. Myers, Nominee for the Union. Mr. Myers would have increased the salaries of the Fire Fighters by a further 0.5% in the second year and 0.25% in the final quarter of the second year in order to narrow the wage disparity between the Police and the Fire Fighters.

FILE NO. AA89-02-001

EMPLOYER: Westfair Foods Ltd.

UNION: Manitoba Food and Commercial Workers, Local 832

ARBITRATOR: P.S. Teskey

APPEARANCES: G. Mitchell, for the Employer
D. Primeau, for the Union

ISSUES: 1. Compensation: Alteration of Wages 8:1400
2. Sec. 80(2) of The Labour Relations Act

DECISION RENDERED: February 1, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Employer had issued, at no cost to front line female store employees, a black and yellow smock, which was required dress. However, after receiving complaints from workers that the smock was uncomfortable, the Employer gradually phased out the requirement. In its place, the Employer instituted a dress code which requested that employees wear black pants, white shirts or sweaters and black shoes. When the workers were no longer compensated for the cost of such items, the Union filed a grievance claiming that the Employer had violated the terms of the collective agreement because it was obligated to pay for all required uniforms. It suggested that the dress code should be considered as a uniform as its requirements were sufficiently rigid. In addition, It contended that the Employer had terminated a benefit without notice, leaving the Union with no opportunity to negotiate some form of compensation.

The Employer argued that it was under no obligation to pay for the workers' new clothes. It pointed out that there was no required uniform for the workers and that the dress code served only as a guideline for employees to follow. It also emphasized that aprons, where required, were provided at no charge to workers. The Employer noted that male employees were never required to wear the smocks and did not receive any allowance for their work clothes.

AWARD: The grievance was denied. The Arbitrator found that the Employer was under no obligation to require the workers to wear the old uniform. Further, it held that the Employer had the right to abolish any clothing requirement previously in force, and was justified in phasing out the smocks, given the complaints received. The Arbitrator ruled that the new dress code was not specific enough to be considered a uniform, and therefore, the Employer was not obligated to compensate workers for clothes purchased.

FILE NO. AA89-02-002

EMPLOYER: Dauphin General Hospital

UNION: Dauphin Nurses MONA, Local 25

ARBITRATOR: J. Atwell

APPEARANCES: W. Harris, for the Employer
R. Deely, for the Grievor

ISSUES:
1. Compensation: Withholding Wages 8:1420
2. Holiday Pay 8:3100
3. Secs. 4(2), 11(1), 13(1), 15 and 19(2) of The Vacations With Pay Act

DECISION RENDERED: February 1, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: In March 1988, the Grievor, who was a registered nurse, received approval to take four days of vacation on July 13th, 14th, 18th and 19th, 1988. In May 1988, the Grievor had some problems at work and was placed on probation. On June 21, 1988, she tendered her resignation which was to take effect July 20, 1988. The day after her resignation came into effect, the Grievor received a letter, saying that she had given insufficient notice and, would not be paid for the four scheduled vacation days. As a result, the Union filed a grievance alleging that the Employer improperly withheld wages, contrary to the terms of the collective agreement. It argued that the Grievor had given four weeks notice, as was required, and emphasized that the Employer had never informed her that her notice was deficient. The Union pointed out that it was common knowledge that the Grievor was to be on vacation for the days in question. Further, because the Grievor was on probation at the time, the Union suggested that the notice provisions did not apply. The Union also noted that nothing in the collective agreement allowed the Employer to withhold pay for insufficient notice.

The Employer submitted that the Grievor had, indirectly, become aware that her notice might not be adequate. It cited Article 7(4) of The Vacations

With Pay Act, which provided that the period of notice should not form part of any annual vacation to which the employee was entitled. The Employer also claimed that it was common knowledge that it withheld pay for inadequate notice.

AWARD: The grievance was allowed. The Arbitrator noted that while the Grievor's notice was inadequate, there was no established procedure entitling the Employer to withhold wages. While the Employer argued that it had suffered a related expense due to the Grievor's actions, the Arbitrator found that there was no significant impact caused by the Grievor's inadequate notice. Accordingly, the Arbitrator ruled that the Employer was not allowed to impose a monetary penalty for a breach of the collective agreement.

FILE NO. AA89-02-003

EMPLOYER: INCO Ltd.
UNION: United Steelworkers of America, Local 6166
ARBITRATOR: P.S. Teskey
APPEARANCES: J.M. Christiansen, for the Employer
D. Brown, for the Union
ISSUES: 1. Organization and Direction of the Workplace: Changes In Job Function 5:2410
2. Criteria: Equal Work or Equal Skill 5:2420
3. Standard of Proof 5:2430
DECISION RENDERED: February 1, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: At the request of management, the Grievor, who was classified as a Stripping Floor Man, worked for two days removing excess nickel from mandrels. The Union filed a grievance claiming that the work was normally performed by the higher classification of Mandrel Preparation Man and sought an adjustment in pay. It pointed out that while the Grievor performed the job, he had to change work stations and use different tools. In addition, it suggested that if the Grievor had not done the job someone in a Mandrel Preparation position would have done so.

The Employer argued that the Grievor performed the same type of duties in his capacity as a Stripping Floor Man and that he only needed a few minutes of training. It explained that the job descriptions of the two classifications overlapped and that the area where the work was performed was used by both classifications. It emphasized that the higher classification involved several other more complex tasks, notably acid dipping and reprinting, which the Grievor did not do. The Employer contended that the functions performed by the Grievor could not be considered as being central or primary to the Mandrel Preparation job.

AWARD: The grievance was denied. While acknowledging that there was some overlap between positions, the Arbitrator held that the Grievor was not performing the central core of duties associated with the higher classification. Noting that the work done by the Grievor was on the periphery of the Mandrel Preparation position, the Arbitrator ruled that the Union had failed to prove that the work performed was better associated with the higher classification.

FILE NO. AA89-02-004

EMPLOYER:	Boeing of Canada Ltd.
UNION:	Canadian Auto Workers, Local 2169
ARBITRATOR:	D.G. Baizley, Q.C.
APPEARANCES:	R. Hansell, Q.C., for the Employer R. Tonn, for the Union
ISSUES:	1. Discharge 7:3542 2. Failure to Co-operate 7:3580 3. Leave Work Without Permission 7:3130 4. The Doctrine of the Culminating Incident 7:4310
DECISION RENDERED:	February 1, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: On the day of the incident, the Grievor, who had a lengthy disciplinary record for absenteeism and tardiness, complained to his supervisor that he was feeling ill. According to the Supervisor, the Grievor was told to go to a nearby hospital to get a note from a doctor verifying his illness, before he would be allowed to leave work early. She claimed she had explicitly directed the Grievor to return to the plant after seeing the doctor so that she could examine the note and meet with him. After obtaining the note, the Grievor returned to the plant, placed the note on his Supervisor's desk and left without seeing her. Upon learning that the Grievor had departed, the Supervisor terminated his employment. As a result, the Union filed a grievance alleging that the Grievor was unjustly dismissed. It argued that the Grievor was never told to see the Supervisor after obtaining the note. It emphasized that he did go to the hospital, obtained the doctor's certificate, returned to the work site, and left the note on the Supervisor's desk.

The Employer contended that the discharge was justified given the poor work record of the Grievor. The Grievor had received notice that any further incidents could result in his termination, and his failure to follow instructions was a culminating incident.

AWARD: The grievance was denied. The Arbitrator found that the Grievor failed to report directly to the Supervisor as instructed. Noting that such actions would normally warrant only a reprimand, the Arbitrator held that given the Grievor's disciplinary record, the Employer was entitled to impose a harsher penalty. The Grievor's non-compliance with the Supervisor's request was seen as a culminating incident, which justified the severity of the penalty imposed.

FILE NO. AA89-02-005

EMPLOYER:	Canada Metal Co. Ltd.
UNION:	Canadian Association of Industrial, Mechanical and Allied Workers, Local 3
ARBITRATOR:	G. Reid
APPEARANCES:	D. Abra, for the Employer S. Spratt/A. Moran, for the Union
ISSUES:	1. Leave Work Without Permission 7:3130 2. The Doctrine of the Culminating Incident 7:4310 3. Company Rules 4:1500 4. Discharge 7:3542
DECISION RENDERED:	February 6, 1989
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor, who was a sheet metal worker, injured his hand at work. His supervisor gave him permission to leave his shift early. According to the Grievor, he met with his supervisor the next day and showed him his hand. Later, he left work without informing anyone in management that he would not be working his shift that day. Because of his unexcused absence from work, and in consideration of his lengthy disciplinary record, he was dismissed. As a result, the Union filed a grievance claiming that the discipline imposed was too severe and sought reinstatement.

The Employer stated that the Grievor did not meet with his supervisor on the day in question. It emphasized that the Grievor knew the consequences of his actions as a sign was posted in the lunchroom explicitly stating that unexcused absences were grounds for discipline or discharge.

AWARD: The grievance was denied. The Arbitrator noted that the rules posted in the lunchroom were not part of the collective agreement. However, citing previous arbitral decisions, he found that the rule in question was reasonable as it was consistent with the collective agreement, was clear and unequivocal and was brought to the attention of the Grievor. In the present case, the Arbitrator held that the requirement for notification was reasonable. Given the Grievor's past history and the other forms of discipline already imposed, the Arbitrator ruled that the Employer was justified in dismissing the Grievor.

FILE NO. AA89-02-006

EMPLOYER: INCO Ltd.

UNION: United Steelworkers of America, Local 6166

ARBITRATOR: W.D. Hamilton

APPEARANCES: J.M. Christiansen, for the Employer
K. Oleksiuk, for the Union

ISSUES:
1. Organization and Direction of the Workplace: Work Hours and Shifts 5:3100
2. Compensation: Paid Breaks 8:3700
3. Sec. 80(2) of The Labour Relations Act

DECISION RENDERED: February 8, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: Under the collective agreement, "day" workers were given a 1/2 hour unpaid lunch break in an 8 1/2 hour work day, while "shift" workers received a paid 1/2 hour lunch break in an 8 hour day. During the period from June to December 1988, a new schedule was posted which required 24 maintenance workers, who were classified as day workers, to work 1 week of afternoon or graveyard shifts for every 8 weeks of day shifts. They were still given the 1/2 hour unpaid lunch break in a work day even though they were scheduled as "shift" workers. The Union filed a grievance alleging that the Employer had violated the terms of the collective agreement because it failed to pay the workers for their lunch breaks. It argued that, as the workers were regularly required to work shifts other than the usual "day" shift, they should be classified as shift workers, and therefore, were entitled to paid lunch breaks for all days worked in the period.

The Employer disagreed with the Union's definition of "shift" worker. From its perspective, a shift worker must be engaged in a continuous schedule requiring the employee to work one of three eight hour shifts. It also argued that the 24 employees were not regularly employed as shift workers, because they were not typically scheduled to shift hours.

AWARD: The grievance was denied. The Arbitrator ruled that the employees' status did not change even when they were occasionally scheduled for afternoon and graveyard shifts during the period in question. He also ruled that the Employer had the right to schedule a group of employees as day workers for a majority of the time while requiring them to do shift work on an infrequent, albeit scheduled, basis. However, he ordered that the workers were entitled to paid lunch breaks while working the afternoon or graveyard shifts.

FILE NO. AA89-02-007

EMPLOYER:	Province of Manitoba
UNION:	Manitoba Government Employees' Association
ARBITRATOR:	P.W. Schulman, Q.C.
APPEARANCES:	A. Rumak, for the Employer G. Rodgers, for the Union
ISSUES:	1. Jurisdiction of the Arbitrator: Estoppel 2:2200 2. Temporary, Casual and Part-time Employees 5:1124 3. Duty to Mitigate 2:1412 4. Restitution and Set-off 2:1480
DECISION RENDERED:	February 10, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: Before accepting an offer for term employment, the Grievor emphasized that job security was a major concern for her. The President of the college assured her that the job would become permanent. Upon accepting the job, the Grievor received the first in a series of letters stating that her term was extended, however, her employment could not be guaranteed past a certain date. On each occasion, she showed the letter to the President who tore them up, and promised her continued work. The Grievor had received continued extensions of her term when she was offered the job of establishing a Jobs Strategy Program. While in this position, the Grievor received further extensions with the same warning that no future employment was guaranteed. Again, the President assured her that her employment would continue. On August 3, 1988, she was dismissed due to budgetary constraints. The Union filed a grievance claiming that by dismissing the Grievor, the Employer had breached the job security provisions in the collective agreement. It admitted that the Grievor was a term employee, but it argued that her term of employment consisted of the completion of a specific program, which would not expire until March 1989. Further, it contended that the President's promises took precedence over the letters she had received.

The Employer submitted that the Grievor was hired for a specific time and that no guarantees were ever made that she would become a permanent employee. It pointed out that none of the letters received by the Grievor ever indicated that she was hired for a specific position. In addition, it submitted that the onus was on the Grievor to obtain a written commitment from the college regarding a full time job.

AWARD: The grievance was allowed. The Arbitrator emphasized that the Grievor had made her concerns regarding job security abundantly clear. He also found that the person who appeared to have authority to hire and fire made continual representations that her employment was to become permanent, representations which he could not go back on. Therefore, he ruled that the Employer was estopped from enforcing the letters against the Grievor. The Arbitrator also ruled that the Grievor was hired for the completion of a specific job. Given that it was to continue until March 31, 1989, the Arbitrator held that the Employer had breached the employment security provisions of the collective agreement. Therefore, he ordered that the Grievor be paid an amount equal to the income she would have received had she worked until the end of the term of the program. He declined to provide for a set-off for Unemployment Insurance Benefits paid to the Grievor. He also declined a set-off by reason of the availability of the position of Education Assistant, because that position paid significantly less than the position held, and since the Grievor had never been offered the position, she could not have mitigated the damage.

FILE NO. AA89-02-008

EMPLOYER: Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: P.S. Teskey

APPEARANCES: R. Cann, for the Employer
S. Hamon, for the Union

ISSUES:
1. Discipline: Rehabilitative Potential 7:4422
2. Reasonable Explanation of Absence 7:3112
3. Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: February 13, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who worked as a Beach Patrol Officer during the summer, was dismissed after claiming one day of sick leave in order to work at another job. The Union filed a grievance alleging that the penalty imposed was too harsh. It argued that some form of progressive discipline should have been employed as this was the Grievor's first violation. As well, it suggested that the Grievor had already lost $2500 in earnings since the incident occurred, which was punishment enough. It also emphasized that the Grievor had served as a Beach Patrol Officer for four years, demonstrating a commitment to the job. It stressed that the Grievor never denied her wrongdoing and had no intention of defrauding the Employer.

The Employer argued that the Grievor's actions were sufficiently serious to justify dismissal. While the Employer noted that, although the Grievor had been an employee for four years, her total hours worked added up to less than one year, and therefore, she had just completed her probationary period. While it was not suggested that the Grievor sought to defraud the Employer, it was emphasized that the Grievor made no attempt to return the sick pay benefits she received.

AWARD: The grievance was allowed in part. The Arbitrator found that the Grievor's conduct was improper and deserving of punishment. However, he also found that this was a single incident and that the Grievor had made all attempts possible to avoid the situation that occurred. Accordingly, the Arbitrator substituted a suspension for the discharge, ordering that the Grievor not be recalled until June 15 of the following season.

FILE NO. AA89-02-009

EMPLOYER: INCO Ltd.

UNION: United Steelworkers of America, Local 6166

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: M. Christiansen, for the Employer
D. Brown, for the Union

ISSUES:
1. Discipline: Employee Disability 7:3200
2. Inability to Discharge Employment Obligations 7:3220
3. Discharge 7:3542
4. Reinstatement and Substitution of Penalty 2:1470
5. Section 121(2)(e) of The Labour Relations Act

DECISION RENDERED: February 14, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who worked as a Conveyorman, suffered from colitis. Because of his medical condition, he had to be in close proximity to a washroom at all times. However, the area in which he worked was a considerable distance from the facilities. He also had difficulty getting someone to take his place on short notice, and leaving his post unattended was unsatisfactory from a production standpoint. In addition, because of his illness, he missed extensive periods of work. Eventually, a doctor recommended that the Grievor not work at the position for which he was hired. When the Employer was unable to find another suitable position, the Grievor received a non-disciplinary termination.

The Union filed a grievance alleging that the Employer violated the collective agreement because as per Article 15.25, it was to endeavour to find other work in the company for any employee who was temporarily or permanently incapacitated by disease. It argued that the Employer had failed to conduct a proper search for alternate employment for the Grievor.

AWARD: The grievance was allowed. The Arbitrator found that a proper search for alternative employment was not conducted. The Arbitrator ordered that a second search be conducted in consultation with Union representatives. The search was to be completed within two months. If no suitable position could be found for the Grievor then the termination would stand.

FILE NO. AA89-02-010

EMPLOYER: Westfair Foods Ltd.
UNION: Manitoba Food and Commercial Workers, Local 832
ARBITRATOR: Dr. P. Phillips
APPEARANCES: G. Mitchell, for the Employer
R. Ziegler, for the Union
ISSUES:
1. Standard of Proof: Criminal Misconduct 7:2500
2. Theft 7:3310
3. Discharge 7:3542
4. Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: February 20, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: A loose package of cigarettes was seen behind the Grievor's cash register, where they did not belong. Claiming that this was odd the manager marked the package and returned it to its resting place. The next day, the cigarettes were missing, and the marked package was found in the Grievor's possession. She was immediately discharged for allegedly stealing the package of cigarettes. She denied that she stole the cigarettes and had no idea how the marked package came into her possession. As a result, the Union filed a grievance alleging that the Grievor was unjustly discharged. It charged that the Grievor was set up, because she had been involved in a dispute with the manager and the chief cashier due to her involvement in a previous labour dispute at the store. It also noted that the Grievor had worked at the store for ten years and had a perfect work record.

AWARD: The grievance was allowed. The Arbitrator was not satisfied, on the balance of probabilities, that the Employer established the Grievor's guilt. While acknowledging that the Grievor's explanation of the events contained inconsistencies, the Arbitrator found that the Grievor's story was equally, if not more probable, than that of the Employer. In making his decision, the Arbitrator was critical of the Employer's handling of the situation, pointing out that the manager failed to investigate the incident properly and promptly. As well, he noted that the Grievor was terminated immediately, rather than being suspended during the investigation, as was the normal procedure.

FILE NO. AA89-02-011

EMPLOYER: Province of Manitoba
UNION: Manitoba Government Employees' Association
ARBITRATOR: W.D. Hamilton
APPEARANCES: R. Cram, for the Employer
P. Williamson, for the Union
ISSUES: 1. Fighting, Assault 7:3430
2. Discharge 7:3542
3. Real and Documentary Evidence 3:3100
DECISION RENDERED: February 22, 1989
EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a Correctional Officer at the Provincial Remand Centre, was escorting an inmate who was being admitted. According to the Grievor, he thought that the prisoner was exhibiting hostile behaviour and would possibly strike someone. In order to avoid this, the Grievor said that he employed the choke hold, which was an approved hold taught to all Correctional Officers, and walked the prisoner down the hall until assistance was provided. As a result of the incident, the Grievor was terminated. The Union filed a grievance claiming that the Grievor was unjustly discharged. It claimed that the Grievor's actions were justified and that he used only the required force. The Employer viewed the actions of the Grievor to be an unnecessary, inappropriate and excessive use of force. The Employer was also concerned with the Grievor's attitude with regards to the incident, as he expressed little remorse regarding his actions.

AWARD: The grievance was denied. After viewing videotaped evidence of the incident, the Arbitrator found that the prisoner, who had previously been disruptive was, at the time, relatively calm. He could not find evidence of hostile behavior on the part of the prisoner which would merit the response issued by the Grievor. Therefore, he ruled that the Grievor's behavior was inappropriate and that the penalty imposed was fair and legitimate. Noting the inadequacy of the Grievor's explanation of events, his attitude toward the job, and the lack of mitigating factors, the Arbitrator held that dismissal was an appropriate penalty.

FILE NO. AA89-02-012

EMPLOYER: Manitoba Civil Service Commission

UNION: Manitoba Government Employees Association

ARBITRATOR: S.G. Sigurdson, Q.C.

APPEARANCES: Not Stated

ISSUES:
1. Weekly Overtime 8:2130
2. Retroactivity 8:1300
3. Revision of Classification and Rates 5:2440

DECISION RENDERED: February 23, 1989 (Interim Award - June 30, 1988)

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, a Correctional Officer 2 (CO2) was assigned new duties and responsibilities in November 1984. In September 1986, he filed an application to amend his classification. From 1984 to 1986, the Grievor functioned as a CO2, performing a 40 hour week like all Correctional Officers. On May 21, 1987, the Grievor was reclassified, retroactive to September 1986, to the position of System Analyst II (SA2), whose regular work week was 36 1/4 hours. A month earlier, the Grievor had raised the issue of the possible entitlement to overtime pay. As a result of the retroactive reclassification, questions emerged regarding what rate of pay the Grievor was entitled for the 3 3/4 hours per week worked in excess of the SA2 standard and from what date the new rate would be paid. The Union argued that the Grievor was entitled to be paid for the hours worked over the entire period in question at the SA2 overtime rate. The Employer held that the Grievor had already received a back pay bonus, and was not entitled to receive the higher salary of the SA2 and the greater hours of the CO2.

AWARD: The grievance was allowed in part. The Arbitrator ruled that the Grievor was entitled to SA2 overtime pay only from the time he alerted the Employer of the overtime implications of a reclassification. At that point, he had made his concerns known to management which could have altered his hours if it had so desired. Prior to this, the Grievor considered himself a CO2, as did his Employer, as he worked a 40 hour week without protest or caveat, thus disentitling him to any overtime benefits for the period prior to April 1987. The Arbitrator also noted that the Employer already made a salary adjustment earlier than the time the request for reclassification was made, which by policy was the effective date of the reclass, and there was no obligation to give him any further benefit by ruling that he worked overtime.

FILE NO. AA89-02-013

EMPLOYER: Tuxedo Villa Nursing Home
UNION: Canadian Union of Public Employees, Local 2180
ARBITRATOR: S.G. Sigurdson, Q.C.
APPEARANCES: K. Lercher, for the Employer
M. Craddock, for the Union
ISSUES:
1. Fighting, Assault 7:3430
2. Reinstatement and Substitution of Penalty 2:1470
3. The Reasonableness of the Penalty 7:4300

DECISION RENDERED: February 24, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: While serving coffee to a resident suffering from Alzheimer's Disease, the Grievor, who was a Kitchen Aide, struck the resident's hand with sufficient force that left a red mark. As a result of this incident, the Grievor was dismissed. The Union then filed a grievance alleging that the Grievor was terminated without just cause. While not disputing the occurrence of the matter, it argued that the Grievor's actions were a reflex to a perceived danger with no malicious intent. According to the Grievor, she noticed that the patient was pulling the table cloth off the table, and fearing that the coffee would spill, she "tapped" the resident so that she would let go of the tablecloth.

The Employer submitted evidence indicating the nursing home's commitment to the self-respect of its residents. All employees were aware of this policy and had received notice that non-compliance with the policy could result in suspension or termination.

AWARD: The grievance was allowed in part. While acknowledging that the Grievor might have handled the situation in a better fashion, the Arbitrator held that the Grievor's actions were not malicious in intent. The Arbitrator found that the Grievor's explanation of events was consistent and credible and that her reaction to the situation, real or apprehended, was spontaneous. However, he expressed concern over any use of physical force in such a setting and the Grievor's flippant response to the Employer's investigation. Nonetheless, the Arbitrator ruled that the dismissal was excessive and imposed a three month suspension instead.

FILE NO. AA89-03-001

EMPLOYER: Rural Municipality of Birtle

UNION: International Union of Operating Engineers, L. 901

ARBITRATOR: R. Poole

APPEARANCES: W. Langford, for the Employer
J. Murphy, for the Union

ISSUES:
1. Discipline: Alteration of Grounds 7:2200
2. Reasonable Explanation of Absence 7:3112
3. Warnings, Suspension, Discharge 7:3542
4. Company Rules 4:1500
5. Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: March 1, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, a general labourer, received a letter in which he was advised that the Employer was not satisfied with his performance and that his status was under review due to three incidents: the failure to lock a mechanical shed; the use of the Employer's shed to change the oil in his personal truck, and the failure to clean up spilled oil; and, the failure to come to work upon recall. The letter also referred to other oral reprimands and a written warning. Subsequently, he was dismissed. The Union filed a grievance alleging that the penalty imposed was too severe. It argued that the failure to lock the shed was an isolated incident and could not be described as a "gross neglect of duty." It added that he did eventually clean up the mess when he was reminded of it. It also stated that no rule existed prohibiting the personal use of the Employer's property. It contended that the Grievor should not be disciplined for failing to return to work when recalled, because he was only notified one hour before the beginning of the shift and was unable to make child care arrangements. The Union pointed out that the agreement gave employees three days to return to work when recalled. The Union objected to the Employer's introduction of new evidence to support its dismissal of the Grievor. It argued that the Employer could not shift its grounds to justify the dismissal. It also argued that this new evidence prejudiced the Grievor, as he could not adequately respond to the charges. Finally, the Union sought to have the letter of reprimand removed from the his file as it could be prejudicial in any future actions against him.

AWARD: The grievance was allowed. The Arbitrator agreed with the Union's arguments with regards to the three incidents. He ruled that only the locked door incident and the failure to immediately clean up the oil spill could justify any form of discipline, but neither justified discipline as severe as dismissal. Therefore, he ordered that the Grievor be reinstated. Because he was on lay-off at the time of the dismissal, the matter of compensation was left for the parties to agree upon. On the subject of the new evidence produced at the hearing, he refused to rely on it as he gave it little weight because much of it was verbal. Moreover, the Arbitrator held that most of the incidents raised subsequently by the Employer were of a minor nature and did not justify discipline. As well, he found the letter of warning contained several inaccurate statements. Accordingly, he ordered the letter of warning struck from his file.

FILE NO. AA89-03-002

EMPLOYER: Province of Manitoba
UNION: Manitoba Government Employees' Association
ARBITRATOR: D.G. Baizley
APPEARANCES: R. Cram, for the Employer
P. Williamson, for the Union
ISSUES: 1. Personal [Acts] Detrimental to Production 7:3570
2. Suspension 7:3542
3. Reasonableness of the Penalty 7:4300
DECISION RENDERED: March 6, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, a staff worker at a centre for troubled youths, was suspended for ten days for sleeping on the job. On the night in question, two residents escaped from the centre. In order to do so, they had to pass by the Grievor in the common room of the building. The Grievor claimed that she did not notice the youths leaving until they had opened the door, causing an alarm to sound. The Grievor denied that she fell asleep. The Employer took the position that sleeping on the job in a position such as the Grievor's was something that could not be tolerated.

AWARD: The grievance was allowed in part. Despite the Grievor's steadfast denial, the Arbitrator found the only plausible explanation of events was that the Grievor inadvertently fell asleep, thereby allowing the residents to escape. Because the Grievor fell asleep inadvertently, and in view of her excellent work record, he ruled that the suspension should be reduced. Accordingly, he ordered the suspension be reduced to three days.

FILE NO. AA89-03-003

EMPLOYER: C.V.C. Services Ltd.
Hydro Projects Management Association
UNION: Hotel & Restaurant Employees & Bartenders, L. 206
ARBITRATOR: F. Steel
APPEARANCES: G.D. Parkinson, for the Employer
F. Thomas/E. Goralski, for the Union
ISSUES: 1. Intention of the Parties 4:2100
2. Management Rights 4:2310
3. Management's Duty to Act Fairly 4:2320
4. Seniority: Lay-off 6:2200
5. Sec. 80(2) of The Labour Relations Act
DECISION RENDERED: March 9, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who was a Manitoba resident, was classified as a Second Cook at the Limestone Project. Another employee who was from out-of-province was initially hired as a Second Cook, but was later temporarily assigned as a Chef. As a result of a reduction of the work force, a Second Cook was no longer needed. The Grievor was laid off for three months, while the other employee was retained. The Union filed a grievance claiming that the Grievor was laid off contrary to Article 12.4 of the collective agreement that contained a preference provision which provided that employees who were from out-of-province at the time of initial hire would be laid off before Manitoba residents. It suggested that the employee from out of the province was only temporarily reassigned and should be viewed as a Second Cook. In addition, the Union took the position that his classification at the time of lay-off was irrelevant. Instead, it suggested that the lay-off provisions affected out-of-province workers based on their classification at the time of their initial hiring. If this approach was not taken, the Union said, then the Employer could get around the preferential provision by promoting out-of-province workers prior to lay-offs. Further, the Union argued that if the other employee was promoted to Chef then the promotion violated the collective agreement, because the Employer was not provided with the rights of promotion.

AWARD: The grievance was denied. The Arbitrator felt bound by the language of the collective agreement which did not include the phrase "at time of hire" when speaking of employee classification, and therefore, she found that the out-of-province employee's classification was formally changed. However, the Arbitrator noted this point need not be made as there was no work for any Second Cook at the time of the lay-off, and the Grievor would have been laid off regardless of the status of the other employee. She questioned why he was not considered for the Chef position. However, the Union did not grieve that issue and it was not argued. Given that no grievance was filed on that issue, she stated that the Union's silence must be taken to mean that the promotion was in good faith and the Employer did not have any ulterior motive to circumvent the provisions of the agreement, and did not violate Section 80(2) of The Labour Relations Act.

FILE NO. AA89-03-004

EMPLOYER: University of Manitoba

UNION: Canadian Association of Industrial, Mechanical and Allied Workers

ARBITRATOR: D.E. Bowman, Q.C.

APPEARANCES: W.D. Hamilton, for the Employer
S. Soronow, for the Union

ISSUES:
1. Resignation 7:7100
2. Discharge 7:3542
3. Discipline: Notification of Absence 7:3110

DECISION RENDERED: March 13, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a caretaker, had applied for personal leave for a period of five months. While he was on holidays, he received a letter informing him that his request was denied. Nevertheless, he did not report to work for three days following his holidays and he did not communicate with the Employer. The Employer, noting that the collective agreement gave it the discretion to dismiss any employee who missed work for three consecutive days without notice or without explanation as to why such communication was impossible, exercised its rights and dismissed the Grievor. The Union filed a grievance claiming that the Grievor was unjustly dismissed. It rejected the Employer's contention that he resigned without notice and argued that he never intended to quit his position.

The Employer took the position that the wording of the collective agreement was perfectly clear. It also claimed that it was under no onus to justify its actions. It explained that the request for leave was denied because the Grievor had said that he wanted to try and develop a landscaping business.

The Grievor disputed the Employer's version of events. He said that he requested the leave of absence because his wife was to enter the hospital. The Grievor stated that he did not think there was anyone he could get in touch with regarding his leave. He emphasized that he never intended to resign and stressed that he mentioned the landscaping business only in the context of providing a livelihood during the leave of absence. The Union argued that the "deemed quit" provision was not mandatory but only created a rebuttable presumption. The Union also contended that the Employer was not reasonable in exercising its discretion with regards to the "deemed quit" clause.

AWARD: The grievance was denied. The Arbitrator, while expressing sympathy with the plight of the Grievor, held that the provisions of the collective agreement were sufficiently clear. As the Grievor made no contact with the Employer regarding his absence, he ruled that the Employer was entitled to treat the Grievor as if he had resigned without notice.

FILE NO. AA89-03-005

EMPLOYER: Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: D.G. Baizley

APPEARANCES: C. Hill, for the Employer
R. Olien, for the Union

ISSUES: 1. Discipline: Insufficient/Careless Work 7:3520
2. Failure to Co-operate 7:3580
3. Suspension 7:3542

DECISION RENDERED: March 13, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievors, the work supervisor and the foreman, were responsible for a crew disposing of diseased trees. When they arrived at the end of the day, which was a Friday, to pick up the workers, they never inspected the site, which was still burning, and only asked the workers how the burning was progressing. Because conditions were extremely dry due to a prolonged drought, the fire spread and caused extensive damage to surrounding brush and private property. As a result of the incident, the Grievors were suspended for three days because they failed to properly supervise the fire. The Union filed a grievance claiming that the Grievors were not culpable and that the punishment imposed was too harsh. It conceded that the Grievors had made a mistake, but stated that the error was in judgement only. It submitted that it was common practice for burning fires to be left unattended.

The Employer argued that it was standard operating procedure never to burn on a Friday. Further, the Employer said that the Grievors had been explicitly told not to burn on private property during the dry conditions. It contended that the Grievors demonstrated a lack of concern for safety as neither inspected the fire to ensure that it was safe to leave.

AWARD: The grievance was denied. While the Arbitrator determined that the instructions were not sufficiently clear and that there was no standard operating procedure prohibiting Friday burning, he found that the Grievors demonstrated a lack of common sense on the day in question. Given the extremely dry conditions, a high degree of care was warranted. As no instructions were given to the work crew regarding safety procedures and no inspection was made at the end of the day, the Arbitrator ruled that the Grievors showed a gross lack of concern for safety. Accordingly, the penalties were said to be reasonable and were upheld.

FILE NO. AA89-03-006

EMPLOYER:	White Horse Plains School Division, No. 20
UNION:	White Horse Plains Teachers Association of the Manitoba Teachers' Association
BOARD:	J.M. Chapman, Q.C., Chairperson H. Piercy, Nominee for the Employer A. McGregor, Nominee for the Association
APPEARANCES:	C. Wallis/G. Currie, for the Employer J. Collins/T. Paci, for the Association
ISSUE:	1. Interest Arbitration 1:0000
DECISION RENDERED:	March 21, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The parties were unable to agree on all the terms of the collective agreement. As a result, the matter was referred to arbitration in accordance with the provisions of The Public Schools Act.

AWARD: The Board ruled on a two year term for the collective agreement. The Union's request that the Employer be required to provide reasons for decisions regarding the granting of sabbatical leave was denied. The Board ruled that reasons were not required as the granting of sabbatical leave was purely a discretionary decision of the Employer. The Union's proposal for the implementation of a deferred salary leave plan was rejected by the Board. It noted that such a plan was still in the developmental stages and imposing amendments which were not clear or final would be inappropriate. The Board considered the parties' submissions on the salary schedules, which was their main point of contention. While the Board agreed with the Employer that the state of the farm economy was in poor shape and that the rate payers could not afford a large increase in taxes, it said that the employees should not be penalized for this fact as they did not benefit in bumper crop years. However, with regards to the Union's request that the salaries should be increased to achieve parity with neighbouring districts, the Board held that all school divisions need not pay the same rates, but some effort should be made to narrow the wage gap. Accordingly, the Board ordered that a staggered salary increase be implemented. On January 1, 1988, salaries would increase 3.25%. On September 1, 1988, a further 0.5% increase would occur. In the second year of the agreement, salaries would rise by 3.45% on January 1 and by another 0.5% on September 1, 1989. The increases would apply to regular teachers, substitute teachers, acting principals, administrative allowances, coordinators of special education, and teachers on sabbatical leave.

DISSENT: H. Piercy, Nominee for the Employer. Mr. Piercy reluctantly agreed with the salary increases given to regular teachers. However, he felt that the increases awarded to substitute teachers should be implemented effective September 1, 1988 and 1989. The increases would total 3.75% for the first year and 3.95% in the following year.

A. McGregor, Nominee for the Association. Mr. McGregor took the position that the wage gap which had occurred after 1983 should be eliminated by the Board immediately. He also felt that the administrative allowance and special education coordinator wages should be raised by 4% in 1988 and 4.2% in 1989. Finally, Mr. McGregor said that the Employer should be obligated to give reasons why sabbatical leave applications were denied.

FILE NO. AA89-03-007

EMPLOYER: Province of Manitoba
UNION: Manitoba Government Employees' Association
ARBITRATOR: M.H. Freedman, Q.C.
APPEARANCES: A. Rumak/R. Cram, for the Employer
G. Rodgers/J. Malanowich, for the Union
ISSUES: 1. Compensation: Overtime Work 8:2130
2. Scheduling Work: Overtime 5:3200
DECISION RENDERED: March 21, 1989
EXPEDITED ARBITRATION: No

CIRCUMSTANCES: For eight days in February 1988, the Grievor, an instructor at Keewatin Community College, taught some courses at the Inco facility in Thompson. During this period, he was assigned eight "contact hours" per day. The collective agreement defined contact hours as assigned instructional responsibilities with a class. The Grievor provided instruction from 7:30 a.m. until noon, and from 12:30 p.m. until 4:00 p.m. In addition, he was required to have one hour per day scheduled for meetings with individual students. The Union filed a grievance claiming that the Employer was assigning too many contact hours in a day and that the Grievor was then entitled to overtime pay. It argued that as per Article 3:04 of the collective agreement instructors were to be assigned contact hours during an eight consecutive hour period in a day. In that eight hour period, one hour must be set aside for lunch and another was to be reserved for meetings with students. This, the Union argued, meant that the Employer could only schedule six contact hours per day. Accordingly, it claimed that the Grievor was owed 16 hours overtime.

The Employer claimed it had the right to assign up to eight contact hours in a day. Further, the Employer suggested that the Grievor was not entitled to overtime because overtime, as stipulated in Article 3.10, was calculated on an annual basis. The Employer contended that the one hour per day scheduled for student meetings was not a contact hour.

AWARD: The grievance was allowed in part. The Arbitrator found that the collective agreement provided that the maximum number of contact hours that may be assigned must properly fit within an eight consecutive hour period. He also noted that, as per The Employment Standards Act, one hour had to be allocated for a meal break, leaving seven hours of contact time available. The Arbitrator determined that the meeting time was not a contact hour and need not be scheduled within the eight consecutive hour period as defined in Article 3.04. Therefore, he ruled that the Employer could only assign seven contact hours per day. However, because overtime was calculated on an annual basis, whether the Grievor was entitled to overtime could not be determined until year end. As a result, the Arbitrator reserved judgement on compensation.

FILE NO. AA89-03-008

EMPLOYER: Builders Furniture Ltd.

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local 1

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: D. Rutherford, for the Employer
S. Soronow, for the Union

ISSUES:
1. Seniority: Lay-off 6:2200
2. Recall of Persons on Lay-off 6:2350
3. Improper Lay-offs 2:1425

DECISION RENDERED: March 23, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who was as a Painter-Helper, had over seven years of seniority. His job functions included painting, taping, sanding and cleaning. Citing a lack of work, the Employer laid the Grievor off for one month. During that time, the Grievor witnessed, and was told, that a junior apprentice, who worked in another area of the plant, was performing his duties at the plant. The Union filed a grievance alleging that the Grievor was improperly laid off, or, in the alternative, that he was not recalled when he should have been. It argued that the Grievor should have been recalled because a junior employee was involved with the painting, sanding, taping and finishing of products. All of these functions, the Union argued, were jobs belonging to the Grievor. Given this, it claimed that the Employer had sufficient work for the Grievor who should never have been laid off.

The Employer submitted that the junior employee was kept on during the slow down because he was working at a different job and he needed the work experience to obtain his classification certificate. The Employer said that the apprentice was to be called in if help was required with moving, sanding or taping. When it discovered that he was painting, it informed another worker that he was not to do such work.

AWARD: The grievance was allowed. The Arbitrator found that the apprentice was spending a significant amount of time performing work that normally would have been done by the Grievor. Therefore, he ruled that the Grievor was improperly laid off. The Arbitrator reserved jurisdiction on the issue of compensation.

FILE NO. AA89-03-009

EMPLOYER:	Empress Foods Ltd.
UNION:	Manitoba Food and Commercial Workers, Local 832
ARBITRATOR:	C.B. Cramer, Q.C.
APPEARANCES:	J.M. Christiansen, for the Employer R.D. Ziegler, for the Union
ISSUES:	1. Discrimination 7:4414 2. Fighting, Assault 7:3430 3. Suspension 7:3542 4. Deterrence 7:4500 5. Management's Duty to Act Fairly 4:2320 6. Section 80(2) of The Labour Relations Act
DECISION RENDERED:	March 29, 1989
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor, who was employed at the Employer's bread plant, was involved in an argument with a fellow employee whom the Grievor claimed had intentionally spilt coffee on him. Ultimately, the argument resulted in a fight in which the other employee was injured. As a result of the altercation, the Grievor was suspended for 5 1/2 weeks. The Union filed a grievance claiming that the Grievor was unjustly suspended. It complained that the Grievor was treated in a harsher manner than the other employee. As well, it suggested that the Grievor's penalty was greater than that imposed on other employees for similar incidents. The Employer held that its actions were justified because of the dangers associated with such behavior in a bakery. The Employer stressed that company rules clearly stated that fighting would not be tolerated.

AWARD: The grievance was denied. The Arbitrator found that the Grievor's actions were not spontaneous as he brooded over the incident for four days. Further, she found that the Grievor was the aggressor, hounding and challenging the other employee who attempted to avoid the conflict. The Arbitrator pointed out that the other employee was disciplined for his part in the altercation, but that he deserved a lesser penalty as his actions were less blameworthy. Therefore, she ruled that the penalty imposed was fair and reasonable.

FILE NO. AA89-04-001

EMPLOYER: Boeing of Canada Ltd.

UNION: Canadian Auto Workers, Local 2169

ARBITRATOR: P.S. Teskey

APPEARANCES: M. Christiansen, for the Employer
L. Diamond, for the Union

ISSUES:
1. Innocent Absenteeism 7:3210
2. The Doctrine of Culminating Incident 7:4310
3. Discharge 7:3542
4. Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: April 4, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor had received written warnings and a five-day suspension for excessive absenteeism and tardiness. When his attendance did not improve, he was discharged. The Union filed a grievance alleging that the termination was unjust as it was disciplinary, and there was no culminating incident deserving discipline. It also argued that if the discharge was non-disciplinary, the test for termination was not met as the Employer had not established that the Grievor would be unable to improve his attendance. Finally, the Union commented that the Employer had shown no real concern for the Grievor's attendance, because, not only was he praised for his improvement, but his supervisor continued to grant leaves of absence. The Employer contended that the Grievor was discharged because his absences where not all purely innocent, but rather there was evidence of some cupability because the absences were short, sporadic and not predictable except that they often occurred on a Monday or Friday. The Employer added that his attempts and willingness to improve were "too little, too late" and he lacked concern for the Employer's interests.

AWARD: The grievance was allowed in part. The Arbitrator found that the Employer's decision did not appear to have been primarily disciplinary in nature, but rather more substantially based upon the problematic nature of the entire attendance record. He categorized the absenteeism record to be a mixture of culpable and non-culpable absenteeism. He stated that in this type of case, the doctrine of culminating incident is modified to allow for any occurrence to justify the employer reviewing the attendance record. He found that the Grievor's last absence, while not blameworthy in nature, was a sufficient occurrence to warrant a review of his record. He also found that the Employer's concerns were valid, because of the Grievor's poor attitude and lack of concern for its interests. However, he raised the concern that the Employer made the decision to discharge the Grievor without any discussion with the Grievor in a regular, consistent and timely basis, especially given his poor attendance record in the previous month. As well, he was not satisfied that a sufficient basis existed to determine the probability that the Grievor would be unable to maintain a regular, consistent attendance in the future. Therefore, he ruled that the Grievor should be reinstated without loss of seniority, but without compensation upon the condition that, if his absenteeism record, which was to be reviewed monthly, fell below the average attendance during a nine month period, the Grievor may be discharged.

FILE NO. AA89-04-002

EMPLOYER: Local Government District of Pinawa

UNION: International Association of Machinists & Aerospace Workers, Whiteshell Lodge No. 608

ARBITRATOR: J.F. Reeh Taylor, Q.C.

APPEARANCES: Not stated, for the Employer
L. Paulson, for the Union

ISSUES:
1. Management Rights 4:2310
2. Rights of Recall 6:2354
3. Express Prohibitions in the Agreement 5:2200
4. Estoppel 2:2200

DECISION RENDERED: April 7, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was as a Custodian/Fireman for 20 years, was employed under a shared services agreement between the Employer and a school division. When the division decided to terminate the agreement, the Grievor was also terminated. Shortly thereafter, the Employer invited applications for the newly created position of Custodian/Fireman. Although the job title was the same as before, the new position contemplated a broader range of duties and higher qualifications than were previously required. The Grievor applied for the job but lost out to a candidate with much less seniority. The Employer explained that the Grievor did not possess the necessary qualifications for the position, while the successful candidate met most of the position's requirements. The Union filed a grievance claiming that the Employer had violated the recall provisions of the collective agreement and because it unilaterally changed the job description. It argued that the Employer was obligated to offer the position to the Grievor as his seniority gave him first claim to the position. The Union admitted that the Grievor did not possess the technical qualifications required by statute. However, it noted that he had been performing the job without the proper credentials for a long period. Therefore, the Employer was estopped from suddenly enforcing the law rigidly. Further, the Union argued that the Employer had an obligation to give the Grievor an opportunity to upgrade his qualifications. Finally, it said that the differences between the candidates' qualifications were not so significant as to disentitle the Grievor to the job.

AWARD: The grievance was denied. The Arbitrator found that the collective agreement only required Union involvement in changes to a grouping of classifications, and as the job in question remained in the same group as before, the Employer was entitled to make unilateral changes to the job description. Because of the new job description, this was essentially a new position and the Arbitrator ruled that the recall provisions did not apply. In any event, he found, given the updated qualifications for the job, the Grievor was not qualified for the position. Finally, he rejected the estoppel argument because the omissions were unlawful and the Grievor was a party to them.

FILE NO. AA89-04-003

EMPLOYER: Motor Coach Industries Ltd.

UNION: International Association of Machinists & Aerospace Workers, Lodge 1953

ARBITRATOR: J.F. Reeh Taylor, Q.C.

APPEARANCES: J. Scurfield, for the Employer
L. Paulson, for the Union

ISSUES:
1. Discharge 7:3542
2. Reinstatement and Substitution of Penalty 2:1470
3. Fighting Assault 7:3430

DECISION RENDERED: April 8, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who had two years of seniority, had taken offense to a comment directed to him by another employee and told the other worker to be quiet or he would put a bullet in his head. The Grievor then patted his pocket to indicate that he was armed. The other worker was not overly alarmed by this exchange. Some time later, he asked the Grievor if he could see the gun. The Grievor reluctantly agreed and showed his weapon. This worker did not feel compelled to report the Grievor's actions. However, he did mention the incident to another worker who alerted management about the situation. As a result, the Grievor was terminated for allegedly committing an assault at the Employer's plant. The Union then filed a grievance alleging that the termination was unjust. It submitted that no evidence existed to prove that the gun was loaded at the time. It also noted that the other employee was a gun enthusiast himself and his desire to see the weapon was motivated as much by professional interest as by fear.

AWARD: The grievance was allowed in part. The Arbitrator held that the Grievor's words and actions did not amount to an assault. In so ruling, the Arbitrator pointed out that there was no real apprehension on the part of the other employee and that the gun was produced long after the threat was made. However, the Arbitrator stressed that the Grievor did unlawfully possess a gun at the workplace. Given this, he ruled that some form of punishment was justified. Therefore, he reinstated the Grievor and substituted the termination with a four-month suspension.

FILE NO. AA89-04-004

EMPLOYER:	University of Manitoba
UNION:	Canadian Association of Industrial, Mechanical and Allied Workers
ARBITRATOR:	M.H. Freedman, Q.C.
APPEARANCES:	W.D. Hamilton, for the Employer S. Spratt, for the Union
ISSUES:	1. Bumping 6:2330 2. Recall of Persons on Lay-off 6:2350 3. Management's Duty to Act Fairly 4:2320 4. Temporary, Casual and Part-time Employees 5:1124
GRIEVORS:	M. Bristow/F. Hebert
DECISION RENDERED:	April 11, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievors were Food Service Workers at the University of Manitoba. When classes were finished in spring, the majority of Food Service Workers were laid off. However, some temporary work was made available from time to time. The collective agreement provided that every attempt would be made to distribute casual work to the most senior workers. The Employer instituted a policy for assigning the work which it felt conformed to the requirements of the agreement. Management would phone the most senior workers first to determine if they wanted to work a particular shift. If so, they were scheduled according to their desires. If a senior employee was not home, management would proceed to call the next most senior worker until the schedule was complete. The schedule was posted for a period of five days prior to the shift in which time a senior employee who had not been home when called could bump a less senior worker. When a summer student worked shifts desired by the Grievors, the Union filed a grievance claiming that the Employer violated the seniority provisions in the collective agreement by not assigning casual work to senior employees. It argued that management's attempts at determining the availability of senior workers was inadequate. It said that the Employer should repeatedly go down the list until the schedule was complete, instead of the single call policy which was in place. The Employer insisted that its policy was fair and reasonable and gave a clear preference to seniority.

AWARD: The grievance was denied. The Arbitrator found the requirement that the Employer continually call senior workers was unreasonable. He pointed out that the initial call procedure produced a satisfactory response. He also found that the posting of the schedule and the five day bumping period for senior workers conformed to the collective agreement. Therefore, he ruled that the Employer did not violate the agreement.

FILE NO. AA89-04-005

EMPLOYER: Westfair Foods Ltd.

UNION: Manitoba Food & Commercial Workers, L. 832

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: R.C. Roy, for the Employer
R. Dheilly, for the Union

ISSUES:
1. Suspension, Discharge 7:3542
2. Lateness 7:3140
3. Production and Attendance Records 7:3322
4. Reasonable Explanation of Absence 7:3112
5. Company Rules 4:1500
6. The Doctrine of Culminating Incident 7:4310

DECISION RENDERED: April 12, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a part-time worker, had a lengthy disciplinary record, consisting of numerous verbal and written reprimands as well as a two-day suspension. In September 1988, he was suspended for two weeks for repeated breaches of company rules involving lateness, inaccurate completion of time cards and unauthorized extension of shifts. In January 1989, he was once again suspended and ultimately dismissed as a result of a "culminating incident". He had returned from holidays and did not inquire about his shift schedule until late the next day. When informed that he was supposed to be working in five minutes he said he was too busy to come in. He also refused to work when management offered to let him begin his shift an hour later. As a result of the two suspensions and the termination, the Union filed three grievances alleging improper suspensions and unjust termination. The Union argued that the missed shift did not constitute a disciplinary offence, and therefore, the doctrine of culminating incident did not apply. As to the accusations of unauthorized shift extensions, it submitted that they were justified because the Grievor was instructed not to leave any work unfinished at the end of a shift. In addition, it noted that the verbal reprimands on the Grievor's record should be removed as he was not informed in writing of such penalties, as was required by Article 27 of the collective agreement.

The Employer argued that the termination was justified due to the Grievor's persistent disregard for company rules. It claimed that there was no rule requiring employees to finish all work before leaving, but company policy stipulated that authorization was required for all extra hours worked.

AWARD: The grievance was denied. The Arbitrator could not find that a policy required workers to stay on past the end of their shift to finish their work. He also accepted the Employer's allegations of improper completion of time cards. While the Arbitrator noted that a missed shift would not normally warrant termination, the Grievor's lengthy disciplinary record justified the severe penalty imposed. Although the Arbitrator ruled that the verbal reprimands should be stricken from the Grievor's record due to lack of notice, he held that the suspensions and dismissals were just.

FILE NO. AA89-04-006

EMPLOYER:	Westfair Foods Ltd.
UNION:	Manitoba Food & Commercial Workers, Local 832
BOARD:	P.S. Teskey, Chairperson W.D. Hamilton, Nominee for the Employer A. Coulter, Nominee for the Union
APPEARANCES:	G. Mitchell, for the Employer R. Tonn, for the Union
ISSUES:	1. Strikes and Lock-outs 9:2100 2. Employee Defined 5:1122 3. Estoppel 2:2200 4. Sections 11 & 12 of The Labour Relations Act
DECISION RENDERED:	April 20, 1989 (Previous Award - September 7/88)
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Board was asked to reconvene to determine the impact of a four-month strike on the employment status of trainees; whether or not trainees should be considered as part of the "group" for purposes of scheduling and calculating the minimum guarantee of hours; and, the remedies for specific other provisions of the collective agreement.

The Employer argued that the Union was estopped from arguing that the trainees were employees, because the Union had filed an application for remedy for an alleged unfair labour practice before the Manitoba Labour Board in which it took the position that individuals hired from April to October 1987 should not be considered as members of the bargaining unit but rather replacement workers for purposes of sections 11 and 12 of The Labour Relations Act.

AWARD: The Board found that the position taken by the Union was irrelevant to create estoppel against it, because the application was withdrawn. An application could not be given the same weight as a ruling by the Labour Board in favour of the Union's application with the Union subsequently advancing a different position before the Arbitration Board.

As to the status of trainees, the Board found the dividing line was whether training in a bargaining unit position took place either before or after the strike while one of the collective agreements was in effect. Persons who were trained during the course of the strike, whether or not they were still employees after the strike, were not within the scope of the previous award. Employees who took free time training prior to the strike and were placed and worked only during the strike, were not entitled to wage adjustments pursuant to the pre-strike agreement. However, the Board ruled that any amount that ought to have been paid to the Union for check-off of dues and initiation fees was to be paid. The Board ruled that trainees were not to be included in the "group" for the determination of minimum guarantee of hours. Including them would create several absurdities, and would not provide them with any benefit. The Board then ruled that the monetary or other benefits from other specific provisions were not due for any work performed during the strike.

FILE NO. AA89-04-007

EMPLOYER: University of Manitoba

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local 9

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: C. Suche, for the Employer
S. Soronow/R. Gutkin, for the Union

ISSUES:
1. Fighting Assault 7:3430
2. Suspension, Discharge 7:3542
3. Motions for Non-suit 3:2640
4. The Doctrine of Culminating Incident 7;4310
5. Reinstatement and Substition of Penalty 2:1470

DECISION RENDERED: April 24, 1989 (Interim Award - November 21, 1988)

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, a short-order cook, was suspended for two months and was ultimately dismissed six months after her reinstatement for threatening and harassing her co-workers. She was accused of making offensive and derogatory comments and using foul language with regards to the sexual activities of the staff and in particular of a supervisor. The Union filed a grievance alleging that the dismissal was unjust. It made a motion for "non-suit", and did not call witnesses. The Employer maintained that the language she used in the work place, the comments she made about their sexual activities, and her conduct had the effect of creating a hostile or offensive environment. It claimed that the Grievor's conduct after she was reinstated from her suspension, constituted a culminating incident. It submitted that the Employer had the onus of establishing a culminating incident, and only then could the entire record be reviewed, and that the incident to be considered must relate to the particular time frame. The Union stressed that foul language did not constitute sexual harassment, and that the vast majority of other employees engaged in gossip and sexual banter. It also challenged the allegations that the Grievor made threats, as evidence was not produced to prove she made any threats.

AWARD: The grievance was allowed. The Arbitrator found that the conduct of the Grievor did not equate to cases of "severe problems such as violent behaviour, insubordination, theft or sexual harassment" as per Article 23.2 of the collective agreement. He would not consider any other forms of disciplinary offences to apply, because if the parties had intended the article to apply in all situations, there would have been no need to add any words after "severe problems." He was satisfied that the Grievor did make improper remarks about some of her co-workers. However, sexual banter, gestures and or gossip were common in the workplace and the Grievor was not alone in making those remarks or repeating gossip. Therefore, he could not conclude that the Grievor's vulgarity constituted "sexual harassment" within any of the guidelines referred to in the Employer's policy or under the criteria mentioned by other authorities. He ordered that the Grievor be reinstated without loss of seniority or other benefits. However, he directed that she should not receive compensation for the time from the preliminary hearing to the date the hearings were reconvened because the delay resulted from the Union's unsuccessful challenge of the interim award in The Court of Queen's Bench.

FILE NO. AA89-04-008

EMPLOYER: Coldstream Products of Canada Ltd.

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local 1

BOARD: C.B. Cramer, Q.C., Chairperson
V.L. Pinchin, Nominee for the Employer
R. McGregor, Nominee for the Union

APPEARANCES: R. Roy, for the Employer
S. Spratt, for the Union

ISSUES: 1. Senior Employee with the Required Ability 6:3210
2. Intention of the Parties 4:2100

DECISION RENDERED: April 30, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: Due to the absence of the Lead Hand, the Employer was required to find another employee to temporarily serve in this capacity. The Employer named a worker to the position who had less seniority than the Grievor. The Union filed a grievance alleging that the Employer violated the collective agreement which provided that "Lead Hands will be senior workers chosen by management for their ability to take charge of their own departments." It argued that this provision meant that the position must be offered to the most senior worker.

The Employer submitted that it had the right and authority to select the most able worker for the position, even if that worker was not the most senior. It noted that often in the past temporary lead hands had been appointed who were not the most senior employees. The Employer said that the successful candidate had the necessary experience, initiative and leadership qualities. The Grievor, on the other hand, was said to lack the requisite tact and diplomacy. It was emphasized that the Grievor did not complain about the appointment of less senior employees on other occasions because he felt that he did not have the capabilities to fill the position at that time.

AWARD: The grievance was denied. The Board found that the phrase "senior workers" did not mean "most senior worker." Therefore, it held that the collective agreement gave the Employer wide discretion to consider applicant ability. The Board ruled that the selection of the less senior candidate was reasonable and was made in good faith.

DISSENT: R. McGregor, Nominee for the Union. Mr. McGregor cited a previous grievance in which a senior worker was bypassed by a junior worker for the temporary lead hand position. The grievance was settled in favour of the senior worker. As a result of the decision, management committed itself to give senior employees an opportunity to demonstrate their abilities at the position.

FILE NO. AA89-05-001

EMPLOYER: Western Grocers, Div. of Westfair Foods Ltd.

UNION: Retail, Wholesale & Department Store Union, L. 469

BOARD: M.H. Freedman, Q.C., Chairperson
W.D. Hamilton, Nominee for the Employer
C. Derham, Nominee for the Union

APPEARANCES: G. Mitchell/R. Roy, for the Employer
R. Tonn/L. Diamond, for the Union

ISSUES:
1. Bumping 6:2330
2. Promotion, Demotion and Transfer 6:2100
3. Lay-off 6:2200
4. Management Rights 4:2310

DECISION RENDERED: May 1, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: Twenty-eight warehouse employees were either laid off or reassigned. One group (Type A), who were the most senior of those laid off, were informed that they had the right to bump the most junior employees within their same classification. The second group, (Type B), were at the bottom of the seniority list and were permanently laid off with no bumping rights. The last group, (Type C) were reassigned within the same classification from the day shift at one warehouse to the night shift at another location. None of them were given the opportunity to bump into a lower classification. As a result, the Union filed a policy grievance alleging that the Employer violated article 2(f) of the collective agreement, because it would not allow senior employees, who had sufficient ability, to exercise their bumping rights. It argued that because seniority was plant wide, an employee could not be restricted from bumping into a given department, classification, or the first most junior position available even if that position was on another shift.

The Employer contended that the collective agreement did not contain any provision to allow employees the expressed right to displace any other employee. It submitted that it was the sole determiner of what job was "available" and an employee had no ownership of a shift.

AWARD: The grievance was allowed. The Board was satisfied that seniority applied on a bargaining unit wide basis. It found that the collective agreement did not limit an employee to bump into a position occupied by the most junior employee in the unit as stipulated by the Employer. Therefore, a senior employee could displace the most junior employee on a particular shift or location. Thus, the Board ordered the Type A employees be allowed to bump as described, and the Type B employees should have been given bumping rights as they were not laid off in reverse order. However, it found that the Type C group was not laid off, but were transferred within the same classification as a consequence of the lay-offs. Therefore, it ruled that the reassignments to a different shift or location were within the Employer's rights.

DISSENT: W.D. Hamilton, Nominee for the Employer. Mr. Hamilton would have found that the right to bump should be limited to job classifications and wage rates and should not encompass bumping rights based upon an individual's preference for a particular shift or location.

FILE NO. AA89-05-002

EMPLOYER: Unicity Taxi Ltd.
UNION: Manitoba Food & Commercial Workers, Local 832
ARBITRATOR: J. Cooper
APPEARANCES: L.B. Nasberg/J.B. Hirsch, for the Employer
A.R. McGregor, Q.C./D. Chomiack, for the Union
ISSUES:
1. Changes in Job Function 5:2410
2. Improper Lay-offs 2:1425
3. Time Limits 2:3128
4. Secs. 1, 130(4) & 133(3) of The Labour Relations Act

DECISION RENDERED: May 1, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: As a result of the introduction of new equipment, the Employer claimed that the need for the Dispatcher positions was eliminated and they were all discharged. The Union filed two grievances alleging; violation of article 19 of the collective agreement, because the Employer refused to retrain the affected employees; and that the Dispatchers were improperly laid off. It submitted that the only real change was that the Telephone Operator Supervisors, whose jobs had little resemblance to that which they had formerly performed, had assumed the Dispatchers' duties.

The Employer argued that the Union had not complied with the time limits set out in subsection 133(3) of The Labour Relations Act, and therefore the matter was not arbitrable. Although it had acceded to the jurisdiction of the Arbitrator at the outset of the hearing, it later argued that, as per subsection 130(4) of the Act, the Arbitrator had no discretion to extend the time limits. As to the merits, the Employer argued that the dispatcher jobs were made redundant by the technological change and that article 12.01 of the collective agreement gave it the right to plan, direct and control operations.

AWARD: The grievances were allowed. The Arbitrator ruled that the case was arbitrable because the Employer acceded to her jurisdiction prior to the commencement of the hearing and was therefore estopped from raising the objection. In addition, the Arbitrator ruled that time limits were not exceeded, because the Employer failed to give the Union a clear and final reply to step 2 of the grievance procedure. As to the merits of the case, she found that the Supervisors spent most of their time performing tasks that were formally done by the Dispatchers. As well, she could not find that there was a technological change as defined by section 1 of the Act. The enhancing program could not be said to be the introduction of new technology, but merely the updating or improvement of existing equipment. Even if it could be defined as technological change, then the Employer violated article 19 of the collective agreement because it failed to retrain the Dispatchers. Therefore, the Arbitrator ruled that the terminations were unjustified and ordered the Dispatchers reinstated with no loss of seniority and compensation for all wages and benefits lost.

FILE NO. AA89-05-003

EMPLOYER: Bristol Aerospace Limited

UNION: Canadian Aerospace Workers, Local No. 5
Canadian Association of Industrial, Mechanical
and Allied Workers

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: K. Lercher, for the Employer
S.I. Soronow/R. Gutkin, for the Union

ISSUES:
1. Management Rights 4:2310
2. The Nature of Disciplinary Sanctions 7:4210
3. Use of the Prior Record 7:4314
4. Subsection 80(2) of The Labour Relations Act

DECISION RENDERED: May 9, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: After reviewing a number of personnel files, the Union became aware that a number of them included documents that contained derogatory written comments. Of concern was the fact that the employees had not been shown and had not signed the documents. As a result, it filed a grievance alleging that the Employer had violated article 23.06 of the collective agreement which required that an employee be shown and sign any written comments that are derogatory or which delayed the employee's scheduled progression. As well, the issue was one of natural justice, because any written comments which were derogatory should be brought to the attention of the employee. If the employee was not aware of the existence of the document, then the contents could not be challenged.

The Employer stated that documents in question were "general" documents and were not disciplinary. In addition, it argued that article 23.06 did not provide general rights, but had specific applicability and had to be considered with the entire article 23. Therefore, it was only restricted from using the documents in relation to the progression and classification of the employee. As well, the collective agreement did not contain a provision which limited the rights of the Employer to keep "general" records on file.

AWARD: The grievance was denied. The Arbitrator could not find that the Employer had technically violated any provision of the collective agreement. As well, he ruled that because the collective agreement did not contain a provision requiring a document be expunged from a file, he had no authority to order the Employer to do so.

FILE NO. AA89-05-004

EMPLOYER:	Burns Meats, A Div. of Burns Foods (1985) Ltd.
UNION:	United Food & Commercial Workers International Union, Local 111
BOARD:	P.S Teskey, Chairperson R. Simpson, Nominee for the Employer A. Coulter, Nominee for the Union
APPEARANCES:	G.D. Parkinson/K. Lercher, for the Employer L. Diamond/S. Roy, for the Union
ISSUES:	1. Jurisdiction: The Collective Agreement 2:1200 2. Work Hours and Shifts 5:3100 3. Overtime 5:3200 4. Paid Breaks (Clean-up) 8:3700
DECISION RENDERED:	May 11, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCE: At the end of their five hour shift, the employees on the "kill floor" were allowed paid time to wash their hands and face, and to clean their outer clothing and equipment as necessary. However, additional personal clean-up time and changing of their uniforms when moving to another department after lunch was performed during the employees' half hour paid lunch break. The Union filed a grievance claiming that the lunch break should begin when the employees were fully cleaned and changed. Alternatively, it submitted that time spent on washing should be used for the purposes of calculating overtime.

The Employer contended that because a clause dealing with the subject was not included in the collective agreement, then the matter was a subject for negotiation rather than arbitration.

AWARD: The grievance was denied. The Board found that it did not have the jurisdiction to rule on the matter because a provision for clean-up time which had not been required by the Employer or a federal inspector was not included in the collective agreement. It agreed with the Employer that this was a matter best suited for negotiations as it did not have the authority to insert such a provision into the agreement.

FILE NO. AA89-05-005

EMPLOYER: Labatt's Manitoba Brewery

UNION: United Food & Commercial Workers Union, Local 330

BOARD: D.E. Bowman, Q.C., Chairperson
R.A. Simpson, Nominee for the Employer
B. Hunt, Nominee for the Union

APPEARANCES: W.D. Hamilton, for the Employer
L. Diamond, for the Union

ISSUES:
1. Arbitrability: Parties 2:3110
2. Intention of the Parties 4:2100
3. Employee Defined 5:1122
4. Vacancies 5:2510
5. Union Security 9:1200
6. Section 80(1) of The Labour Relations Act

DECISION RENDERED: May 15, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Union, which represented brewery employees throughout Winnipeg, was required under article 4.01 of the collective agreement to keep a list of all unemployed brewery workers by company. The article also required that if the Employer needed to fill a position, it would select from the list if it could find an unemployed worker who was satisfactory. The Union filed a grievance claiming that the Employer had violated article 4.01, because it failed to fill two vacant permanent positions from that list. The Union submitted that since the Employer knew who its unemployed workers were, the "list" referred to in Article 4.01 must be a list including members who had been employed by other breweries. It argued that the Employer could not adequately determine who was satisfactory because it did not interview all those who applied. Finally, it argued that since all of the applicants were satisfactory, they should have been given priority over external applicants.

The Employer raised a preliminary objection to arbitrability, because the unemployed brewery workers from another company did not maintain any rights to grieve under the collective agreement. However, the Board was of the view that the case should be heard as a whole rather than attempting to deal with the Employer's objection in a vacuum, and therefore found that the grievance was arbitrable. In any event, the Employer argued that it had not violated the collective agreement, because it had considered the list and only found three satisfactory unemployed workers. Failing to find other satisfactory candidates, the two remaining positions were offered to non-members. It further argued that "its" in article 4.01 referred back to "the Company." It contended that the assumption that it must have a list of its own unemployed workers was incorrect, because once an employee ceased to be employed, his name would not appear on a seniority or recall list. As well, it stated that a threshold test was not relevant to the consideration of an initial hiring. If it was obligated to fill the positions from the list, then those on the list should not need to make a formal application as the list would make their application automatic.

AWARD: The grievance was denied. The Board found the Employer's interpretation of Article 4.01, although not free from difficulty, was the more appropriate. In the absence of "hiring hall" language in the article, the Board could not find that the Employer was obligated to minutely scrutinize each unemployed member of the Union before considering applicants from outside. The most expressed language would be required before it could rule that the Employer had acted in ill faith. Therefore, it ruled that the Employer did not violate the provisions of the collective agreement.

DISSENT: B. Hunt, Nominee for the Union. Mr. Hunt agreed with the Union that the list would contain the names of unemployed workers from other companies, because it would make no sense to forward a list to the Employer of its own employees. He believed that this argument was strengthened by the fact that under the Guaranteed Wage Program, the Employer supplied the Union with information on employees who were laid off and receiving benefits under the plan. As well, he found flaws with the hiring process, because the Employer excluded six applicants from the interview process only after briefly discussing their abilities with his counterparts at the other brewery. Therefore, he did not accept the Employer's explanation of article 4 and would have upheld the grievance.

FILE NO. AA89-05-006

EMPLOYER: The Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: P.S. Teskey

APPEARANCES: A. Rumak/D. Cieszynski, for the Employer
G. Rodgers/J. Malanowich, for the Union

ISSUES:
1. Estoppel 2:2200
2. Intention of the Parties 4:2100
3. Temporary, Casual and Part-Time Employees 5:1124
4. Discrimination 7:4414

DECISION RENDERED: May 18, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, a term employee, indicated his desire to be converted to permanent status, because, as per article 5.04 of the collective agreement, he would have been continuously employed as an instructor for 24 months, and as he was scheduled to teach to the end of the school year, there was a perceived need for his services to continue. His request was not addressed for several months and due to the "runaround", the Grievor filed a grievance alleging violation of article 5.04. During the grievance process, the Grievor was notified that his term would expire on the date indicated in the last letter he had received extending his term. The Grievor filed a further grievance claiming unfair dismissal under article 7.01 and 43.00 based upon the indication that the position would continue past the 24 month anniversary. He also contended that he was discriminated against because he had filed the grievance.

The Employer argued that no discrimination had occurred because the terms of other employees were not renewed. In addition, it contended that, although the "function" of instructor was to continue, the need for the "position" was eliminated because the Grievor's workload had been distributed to other instructors.

AWARD: The first grievance was denied, while the second was allowed in part. The Arbitrator was satisfied that "position" was intended to have a similar meaning to "job" whereas "function" was a broader term related to "classification". He also found that a review of the organization had been ongoing, and that the Grievor's position had been eliminated. Therefore, he could not order the conversion to permanent status. However, he found that the Employer failed to disclose that the term would not likely be renewed and because the Grievor had been lead to assume that he would be teaching until the end of the school year, the Arbitrator ruled that the Employer was estopped from dismissing the Grievor until that time. Therefore, he ordered the Employer to compensate the Grievor for lost earnings from the end of his term until the end of the school year.

FILE NO. AA89-05-007

EMPLOYER: Abitibi-Price Inc.
UNION: United Paperworkers International Union, Local 1375
ARBITRATOR: C.B. Cramer, Q.C.
APPEARANCES: B. Ferguson, for the Employer
C. Christensen, for the Union
ISSUES:
1. Intention of the Parties 4:2100
2. Time Limits 2:3128
3. Abandonment, Settlement and Withdrawal 2:3230
4. Premium Rates and Bonuses 8:2000
5. Sec. 130(3) & (4) of The Labour Relations Act

DECISION RENDERED: May 18, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The parties disagreed on the interpretation of article 16 of the collective agreement which dealt with the premium pay which workers received for putting wires on the paper machine. The Union claimed that workers were entitled to the premium from the moment the wire was "handled" even if the wire had not been changed. On the other hand, the Employer said that the crew was entitled to one wire pay for changing the wire and the change was not complete until the paper machine was back in production. In addition, the Employer raised a preliminary objection to the arbitrability of the case. It was of the opinion that the Union had withdrawn its grievance and thus there was no grievance. The Union indicated that it had an internal problem and that the grievance had been withdrawn without official authority and in an undemocratic fashion.

AWARD: The grievance was denied. As to the preliminary objection, the Arbitrator found that time limits were not breached under section 130(4) of The Labour Relations Act or article 32.01 of the collective agreement. She also found that the Employer was aware that there was no formal written withdrawal and that the matter was unresolved within the Union. Therefore, she ruled that the matter could still proceed. As to the interpretation of article 16, the Arbitrator found the language and wording was silent as to what constituted a wire change. In addition, there was no common practice upon which to base a decision. She found the Union's argument that a worker was entitled to the premium as soon as there was physical contact with the wire to be absurd. However, she ruled that in the absence of expressed words which entitled the workers to the extra pay, it would be wrong to impute them. She declared that the parties should address the matter in future negotiations.

FILE NO. AA89-05-008

EMPLOYER:	Manfor Ltd.
UNION:	Canadian Paperworkers Union, Local 342
ARBITRATOR:	P.S. Teskey
APPEARANCES:	R. Roy, for the Employer M. Myers, Q.C., for the Union
ISSUES:	1. Estoppel 2:2200 2. Compliance with the Wage Structure 5:2400 3. Entitlement to Wages 8:1000
DECISION RENDERED:	May 19, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor was awarded one of six newly created positions of Woodyard Supervisor. The wage rate was slightly lower than what he received from his previous position, but he had been informed that the Union had initiated a wage dispute. The Union filed a grievance alleging that the Employer violated article 13.04 of the collective agreement, because it failed to discuss the starting salary of a newly created position with the Union. As well, the Union disagreed with the Employer's rationale for setting the starting salary which was based on a differential above the hourly rate of the employees being supervised. It argued that other factors such as required qualifications and degree of responsibility should have been considered.

The Employer argued that the methodology used to calculate the wage rate was in line with industry practice. As well, the Employer argued that the Union was estopped from advancing the grievance because it had not objected to the differential principle throughout negotiations for the new collective agreement. Finally, it contended that the Grievor knew the salary rate when he accepted the job, and thus the Union could not prove that the wage was unfair.

AWARD: The grievance was denied. The Arbitrator could not find any evidence to indicate that there had been a discussion between the parties regarding the formula used to calculate the wage rates. Therefore, he found that the evidence of the negotiations was neither clear nor unequivocal to amount to estoppel. However, as to the merits of the case, the Arbitrator found that although industry practice was a valid criteria upon which to base the wage scale, additional factors should have been considered. In this case, he found the evidence was insufficient for him to alter the initial determination of the Employer.

FILE NO. AA89-05-009

EMPLOYER:	The City of Winnipeg
UNION:	Canadian Union of Public Employees, Local 500
ARBITRATOR:	D.E. Bowman, Q.C.
APPEARANCES:	M.E. Cavett, for the Employer M. Myers, for the Union
ISSUES:	1. Estoppel 2:2200 2. Changes in Job Function 5:2410 3. Vacancies 5:2510 4. Promotion, Demotion and Transfer 6:2100
DECISION RENDERED:	May 25, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: Due to the computerization of operations, certain "B" clerks were temporarily assigned to the duties of "C" clerks who were sent for training on the new system. At first, the Employer offered the positions to the most senior "B" clerks. Subsequently, events began to move faster than the Employer had anticipated and it promoted a number of junior employees, and by-passed more senior employees who were qualified for and interested in the jobs. The Union filed a policy grievance alleging violation of Article 12 of the collective agreement which stated that vacancies and promotions would be awarded on the basis of seniority. It also argued that the Employer was estopped from adopting a procedure which was inconsistent with the existing and accepted practice, but if it was going to ignore seniority, then it was obligated to bulletin the positions in order to be able to consider other factors.

The Employer offered that seniority was not followed, because of the accelerated rate of reassignment and the approaching deadline for completion of training, it was necessary to consider employees' familiarity with a particular job and the likelihood or extent of disruption to operations. As well, it did not reassign some of the more senior employees, because they themselves would be difficult to replace. It also argued that there was no conclusive evidence of a single practice governing temporary reassignment. As well, it stated that no vacancies existed and the situation was outside the scope of the collective agreement.

AWARD: The grievance was allowed. The Arbitrator agreed with the Employer that the reassignments, although for a longer term than anticipated, were not strictly within the ambit of Article 12. However, he stated that the situation was governed by the general principles of collective agreement law. In this case, the Employer chose to follow the practice of offering the position in accordance with the seniority list, and did not have the rights to assume a process of past practice and then abandon such an approach in the middle of the process. Such actions were arbitrary and not justified by any sudden and unexpected emergency. He also could not find that the employees who were passed over were not able to perform the job as effectively or be trained as quickly as those chosen. Therefore, he ruled that the Employer had violated the collective agreement "as a whole." He reserved jurisdiction on the matter of compensation.

FILE NO. AA89-05-010

EMPLOYER:	The Province of Manitoba
UNION:	Manitoba Government Employees' Association
ARBITRATOR:	M.H. Freedman, Q.C.
APPEARANCES:	A. Rumak/R.D. Cram, for the Employer G. Rodgers, for the Union
ISSUES:	1. Overtime 8:2100 2. Damages 2:1410 3. Subsec. 121(2)(a) of The Labour Relations Act
DECISION RENDERED:	May 30, 1989 (Previous Award - March 21, 1989)
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: In a previous award, the Arbitrator determined that the Grievor was assigned one additional hour of work for eight days in violation of the collective agreement. The parties resubmitted the matter to the Arbitrator for a determination of the compensation to be paid. Although the Grievor was not entitled to daily overtime pay, and his annual hours did not exceed the maximum allowed, the Union argued that the Grievor should be compensated for eight hours at the overtime rate. The payment would be in the nature of damages, which was distinct from overtime pay, so as to penalize the Employer for the violation of the collective agreement. The Employer asserted that there was no authority under the collective agreement to pay overtime. It also argued that the Grievor was not entitled to receive any damages.

AWARD: The grievance was denied. Arbitral jurisprudence established that damages were to be awarded so as to put the one who suffered into the position he would have been had the collective agreement not been violated. However, in this case, the Arbitrator could not find that the Grievor had suffered by working the extra hours. Therefore, he ruled that the Grievor was not entitled to compensation by the way of damages in the form of overtime pay.

FILE NO. AA89-05-011

EMPLOYER:	The Province of Manitoba
UNION:	Manitoba Government Employees' Association
ARBITRATOR:	M.H. Freedman, Q.C.
APPEARANCES:	R.D Cram, for the Employer J. Malanowich, for the Union
ISSUES:	1. Intention of the Parties 4:2100 2. Management Rights 4:2310 3. Fringe Benefits 8:3000(remoteness allowance)
DECISION RENDERED:	May 30, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor, who was employed as a Correctional Officer I, regularly worked a 10 hour shift. When he received compensation for remoteness allowance, he was given 2 days travel time at 8 hours per day rather than 2 days at 10 hours per day. The Union filed a grievance in which it alleged violation of Article 1:14 of Appendix B of the collective agreement which entitled a full-time employee "to receive up to a maximum of two days travel time without loss of regular pay." It asserted that under the Memorandum of Agreement, the regular hours for calculation of overtime and vacation time were 10 hours per day, and therefore, the remoteness allowance should also be calculated at 10 hours per day.

The Employer argued that it had chosen the 8 hours per day and that was a discretionary amount. It asserted that it allowed 8 hours per day as an administrative credit whether the employee worked 8, 10, or 12 hour shifts. It further argued that the clauses in the agreement concerning vacation, sick leave and overtime, dealt specifically with the allowable hours, but this did not suggest that these amounts were applicable in other clauses.

AWARD: The grievance was denied. The Arbitrator was satisfied that the regular work day was 10 hours long. However, article 1:14 allowed "up to a maximum" for 2 days travel. Therefore, an employee was not necessarily entitled to receive the full 2 days. The wording of the clause gave the Employer the discretion, which it must exercise in a reasonable manner, to award something less than the 2 days travel time. In the absence of evidence to show that the Grievor had incurred 20 hours or more, the Arbitrator ruled that the Employer had not acted in bad faith. As well, he ruled that the Grievor was not discriminated against, because all employees received a 16 hour credit.

FILE NO. AA89-05-012

EMPLOYER: The City of Brandon

UNION: The City of Brandon Police Association

ARBITRATOR: Grant Reid

APPEARANCES: R. Singleton, for the Employer
J.P. Janzen, for the Union

ISSUES:
1. Computation of Vacation and Vacation Pay 8:3230
2. Equal Pay for Equal Work 8:1100
3. Intention of the Parties 4:2100
4. Section 8(1) of **The Vacations With Pay Act**

DECISION RENDERED: May 31, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Union filed an individual and a policy grievance regarding the appropriate rate of pay which should be allocated to Officers for vacation time when the Officers had acted for a portion of the year in a more senior staff capacity than their permanent rank. Past practice was to calculate vacation pay at the rate of the lower rank.

AWARD: The grievance was allowed. In making his decision, the Arbitrator considered Article 20, which consistently used the phrase "normal rate of pay" to specify the basis for computing vacation pay, and Article 24 which stated that employees performing superior duties would be paid at the "prevailing wage rate for such higher rank." He ruled that the words "prevailing" and "normal" were effectively equivalent as they both referred to the rate that was in use at a particular point in time for a specific rank. He also found that, in this case, it was "normal" for Officers to have varying rates of pay during the year when they were placed in acting capacity of superior rank. Therefore, he ruled that the most reasonable and equitable interpretation of the agreement is that vacation pay should be given in proportion to the total earnings of the Officer at the particular ranks that are occupied during the relevant year, and also as a function of the time that the individual rank was occupied.

FILE NO. AA89-06-001

EMPLOYER: Westfair Foods Ltd.

UNION: Manitoba Food and Commercial Workers, Local 832

ARBITRATOR: P.S. Teskey

APPEARANCES: G. Mitchell, for the Employer
D. Primeau, for the Union

ISSUES:
1. Management Rights 4:2310
2. Express Prohibitions in the Agreement 5:2200
3. The Requirement of Bona Fides 5:2300
4. Sec. 80(2) of **The Labour Relations Act**

DECISION RENDERED: June 7, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Employer split the Pharmacy Department into two departments, the O.T.C. and the Pharmacy. The Employer explained that the department was split due to difficulties with the Pharmiceutical Association, the neglect of the O.T.C. operations, and the natural growth of the department. As a result of the split, four employees were transferred out of the bargaining unit to fill the newly created positions of O.T.C. Supervisor. The Union filed a grievance alleging that the Employer improperly created the O.T.C. Department and that the excluded supervisors should be returned to the bargaining unit. The Union was also concerned of the impact upon the guaranteed hours for part-time employees which was dependent upon the number of unrestricted staff in the department. As well, it argued that seniority could be jeopardized as junior employees in one of the two departments may be scheduled for more hours than senior employees in the other. The Employer contended that as per Article 19.20, it had established a new department in accordance with the needs of the business, and had properly notified the Union of its actions. It stated that the guaranteed hours would not be affected as the number of total hours were not being reduced.

AWARD: The grievance was denied. The Arbitrator was of the opinion that Article 19.20 was not intended by the parties to be operative only if there was no potential impact on the guaranteed hours. He found that the Employer had established that bona fide needs of the business were better met by the division of the department. He ruled that the Employer's decision was proper, was not inconsistent with the collective agreement as a whole, and did not defeat seniority rights. As well, he ruled that the Union had not met the onus to prove that the Employer acted unfairly, in bad faith, or unreasonably.

FILE NO. AA89-06-002

EMPLOYER:	Burns Meats Ltd.
UNION:	United Food and Commercial Workers, Local 111
BOARD:	D.G. Baizley, Chairperson R.A. Simpson, for the Employer C. Lang, for the Union
APPEARANCES:	G.D. Parkinson, for the Employer L. Diamond, for the Union
ISSUES:	1. Intention of the Parties 4:2100 2. Qualifying for Holiday Pay 8:3120 3. Status of Persons on Lay-off 6:2352
DECISION RENDERED:	June 7, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor was laid off in February 1988 and was recalled on May 2, 1988 and returned to work on May 3rd. He sought payment for May 2nd as a "paid holiday" to which he believed he was entitled under section 9 of schedule B to the collective agreement. The Employer refused payment because the Grievor was not "on the payroll as of April 1st" in the year for which he was seeking the holiday. The Union filed a grievance arguing that "on the payroll as of April 1st" did not require the employee to be paid in respect of that very day, but rather required the existence of an employment relationship as of that date. It also contended that the paid holiday was a fringe benefit negotiated as part of the collective agreement which could not be denied without express language taking it away.

The Employer responded that the phrase "on the payroll as of April 1st" would not have been required under the Union's interpretation of the collective agreement, and therefore it should not be ignored. As well, the Employer pointed out that the language in Article 10.2(c) which dealt with the determination of seniority status contained the phrase "off Company payroll" which is consistent with the spirit of the language in schedule B. Therefore, the collective agreement contemplated the notion that even though an employee may maintain an employment relationship while on lay-off, it did not follow that this fact alone would establish that the employee on lay-off was "on the payroll as of April 1st each year."

AWARD: The grievance was denied. The Board agreed with the arguments of the Employer, and ruled that being on the payroll required more than simply being on lay-off and entitled to recall. While an employee may not be required to be paid for April 1st itself, he must be involved in some active employment around that date and beyond in order to satisfy the meaning of the words used.

FILE NO. AA89-06-003

EMPLOYER: Bristol Aerospace Ltd.

UNION: Canadian Aerospace Workers, Local 5
Canaadian Association of Industrial, Mechanical
and Allied Workers

ARBITRATOR: P.S. Teskey

APPEARANCES: G.D. Parkinson, for the Employer
R. Gutkin, for the Union

ISSUES: 1. Changes in Job Function 5:2410
2. Sec. 80(1) & (2) of The Labour Relations Act

DECISION RENDERED: June 8, 1989

EXPEDITED ARBIRTATION: Yes

CIRCUMSTANCES: The Employer introduced a new computerized inventory system which resulted in a change of duties for the Storesman classification. The Union filed a policy grievance alleging that the Employer had violated the collective agreement, because the Storesmen were required to perform additional duties over and above those listed in article 1.03, schedule B. Therefore, it argued that the implementation resulted in certain changes to the "job." The Employer contended that the duties, accountabilites and responsibilites of the Storesmen had not changed substantially.

AWARD: The grievance was denied. The Arbitrator found that the new duties were additions to the job content rather than a substantial qualitative change in the actual function performed. The "skill" of working with the computer had been in existence; the function of maintaining accurate count of goods was previously performed, although perhaps not to the same degree of exactitude; and, the level of "accountability" had not increased. Therefore, the Arbitrator ruled that the increase in workload was not necessarily a reason for reclassification, because there was no indication that the Employer expected an inordinate amount of work to be done, nor was any disciplinary action taken against any employee based on an unreasonable expected standard of performance.

FILE NO. AA89-06-004

EMPLOYER: Olympic Pant & Sportswear Company Ltd.

UNION: Amalgamated Clothing & Textile Workers Union, Local 459

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: D. Janz, for the Employer
K. Graham, for the Union

ISSUES:
1. Insufficient and/or Careless Work 7:3520
2. Suspension 7:3542
3. The Reasonableness of the Penalty 7:4300

DECISION RENDERED: June 9, 1989

EXPEDITED ARBIRTATION: No

CIRCUMSTANCES: The Grievor inadvertently put the wrong chemical into a washer and damaged the goods. As a result of his negligence, the Grievor was dismissed, but was reinstated 16 working days later. The only issue to be determined was the amount of compensation he was to be paid. At the time of his dismissal, he received 5 day's pay in lieu of notice. The Union claimed the Grievor should be paid for the entire 16 days. On the other hand, the Employer claimed he should not be paid for any of those days, and it should be recompensed for the 5 day's pay in lieu of notice.

AWARD: The grievance was allowed in part. The Arbitrator found the Employer was entitled to impose some disciplinary penalty. However, he was of the opinion that a suspension for one week would have been adequate, because the damage was not malicious, and the Grievor, who was a good employee with an unblemished record, had admitted his error and showed genuine remorse for the incident. Therefore, he ordered that the Grievor be compensated for 11 working days.

FILE NO. AA89-06-005

EMPLOYER: Leaf Rapids School District No. 2460

UNION: Leaf Rapids School Association No. 2460
of the Manitoba Teachers' Society

BOARD: D.G. Baizley, Q.C., Chairperson
G. Williams, Nominee for the Employer
A. McGregor, Nominee for the Union

APPEARANCES: T. Cooper et al, for the Employer
J. Minions et al, for the Union

ISSUE: 1. Interest Arbitration 1:0000

DECISION RENDERED: June 13, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The parties were unable to settle on all of the terms of their current collective agreement.

AWARD: Article 3(A) - Salary Schedule - The Board was reluctant to award the Union's request for salary increases which were greater than the percentage increases established in other school districts throughout the province. It stated that it was dangerous for an arbitration board to break new ground late in the contract year because either party might conclude that delaying a settlement may be to its advantage. Therefore, because no compelling circumstances existed to depart from the norm, it awarded a 3.25% increase for January 1, 1988 and 3.45% increase for January 1, 1989.

Article 3(B) & 3(C) - Classification and Experience - The Board allowed the revision to the salary grid as proposed by the Employer which provided that a teacher who upgrades to a new classification is moved to the next point on the grid above the salary previously earned rather than simply carrying the years of experience forward. However, the Board was uncomfortable to depart from the notion that there should be an inducement for a teacher to acquire a university degree and therefore excluded the three classifications which cover teachers who do not have a degree from the system of movement on the salary grid. As well, the Board grandfathered the present method for teachers who may have already be in the process of upgrading their qualifications.

Articles 7 - Substitute Teachers Rate, 10(A) - Transportation Allowance, 10(B) - Moving Expenses and 10(F) - Principals and Vice-principals Allowances and Salary, were all linked to the increase granted to salary. Therefore, the Board awarded the same increases as in Article 3(A).

Article 6(B)(1) - Leave for Society Business - The Board would not award the Employer's request for a cap on the amount of leave for union business because a problem with the amount of leave taken had not existed to date.

Article 10(D) - Extended Health Care Plan - The Board did not award the Union's request that the Employer's contribution to the premiums should be increased from 50% to 100%, as the Employer's contribution had already doubled and due to the uncertainty with the cost of health care insurance.

Article 10(E) - Housing Allowance - The Board amended the article so that the allowance was available on a "per teacher" rather than a "per house" basis to ensure that a benefit was equally paid to each teacher. However, because housing costs were not expected to rise dramatically and from evidence of allowances paid in other northern school districts, the Board did not award the Union's request to increase the amount of the allowance.

New Article - Recognition of Responsibility - The Board was not inclined to grant the inclusion of this clause, due to the lack of evidence that the teachers in this district had an excessive load due to their extra-curricular activities when compared with other school districts.

DISSENT: A.R. McGregor, Q.C., Nominee for the Union. Mr. McGregor would have awarded the bonus payment to teachers at the maximum salary level as suggested by the Union in order to bring their salary closer to the maximum salary in other regions. He would not have changed Articles 3(B) & (C) because the Employer should be compensating the teachers for an increase in their qualifications. As well, he would have grandfathered all affected individuals and not just those currently upgrading their qualifications as they had an existing right taken away. Although Mr. McGregor agreed with the award regarding the health care plan, he did not view the uncertainty as to future health costs as a valid factor for consideration, and he would have place more weight on other health care plans in the community. He would have granted an increase to the housing allowance as it is similar to all other allowances and should have been subject to the same increase as salary. Finally, he would have awarded a clause on Recognition of Responsibility. The data asked for by the Employer was difficult to obtain. As well, he felt that less emphasis should be placed on province-wide ramifications and more on the specific situation.

G.T. Williams, Q.C., Nominee for the Employer. Mr. Williams would have included the three classifications excluded by the majority in the change made to Article 3(B) & (C), because a degree was not always necessary. He would not have allowed an open-ended allowance for leave for society business, but would have accepted a cap on the days available. He would not have allowed the housing allowance per person. In fact, he felt that the allowance was no longer required as the housing situation had changed. When adding the allowance to the salary, the teachers were the highest paid in the northern part of the province.

FILE NO. AA89-06-006

EMPLOYER: Inland Cement Limited

UNION: United Cement, Lime and Gypsum Workers, Local 505

BOARD: J.M. Chapman, Q.C., Chairperson
H.G. Piercy, Nominee for the Employer
P. Moist, Nominee for the Union

APPEARANCES: W.L. Ritchie, Q.C., for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Reasonable Explanation of Absence 7:3112
2. Discharge 7:3542
3. Rehabilitative Potential 7:4422

DECISION RENDERED: June 15, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: During an overtime shift, the Grievor inhaled propane fumes and felt ill. He could not find his supervisor, but informed another that he was going home. Later, he was seen by his supervisor in a beverage room playing pool. The Employer discharged the Grievor because he was absent without reasonable cause, had not punched out, and because he had a bad attendance record. The Union filed a grievance alleging that the termination was unjust.

AWARD: The grievance was denied. The Board found that the Employer was justified in imposing discipline because the Grievor did not establish good cause for being absent from work as he made no attempt to seek medical attention that day and was well enough to pick his wife up from work and to play pool. As well, it found that the Employer was justified in disciplining the Grievor, because he went home without notification of the proper authorities and did not punch out. Therefore, based upon the Grievor's poor attendance record, his unacceptable behaviour on the day in question and his lack of rehabilitative potential, it ruled that the dismissal was justified.

DISSENT: P. Moist, Nominee for the Union. Mr. Moist would have reinstated the Grievor without compensation, because the Employer should have requested to see a medical certificate or have the Grievor examined by the company physician, and because it had failed to conduct a full investigation into the matter. As well, he stated that an employee could be too sick to perform heavy manual labour, but not be confined to bed. Finally, he felt that there was rehabilitative potential now that many of the Grievor's medical problems had been resolved.

FILE NO. AA89-06-007

EMPLOYER:	The University of Manitoba
UNION:	Canadian Association of Industrial, Mechanical and Allied Workers, Local 9
ARBITRATOR:	J.M. Chapman, Q.C.
APPEARANCES:	W.D. Hamilton, for the Employer S.I. Soronow, for the Union
ISSUES:	1. Resignation 7:7100 2. Unauthorized Absence 7:3114 3. Management Rights 4:2310
DECISION RENDERED:	June 20, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor was not seen at work by his supervisor for three days. The Employer notified him that as he had been absent without requesting authorization for three consecutive working days, he was deemed to have resigned without notice as per clause 15.6 of the collective agreement. The Union filed a grievance alleging unjust termination, because the Grievor denied that he resigned without notice and claimed that he was at work on the three days in question.

AWARD: The grievance was denied. The Arbitrator found that the Grievor was absent from work, because he could not produce any witnesses who could confirm his attendance, and because he could not identify the areas in which he claimed to have worked. Based upon the evidence, the Arbitrator found that the Grievor was absent from work without authorization for three days. Therefore, he ruled that because this was not a disciplinary case, the Employer had the discretion to deem the absence as a resignation.

FILE NO. AA89-06-008

EMPLOYER: Motor Coach Industries Ltd.

UNION: International Association of Machinists and Aerospace Workers, Lodge 1953

ARBITRATOR: D.E. Bowman, Q.C.

APPEARANCES: J. Scurfield/J. Jeffrey, for the Employer
L. Paulson, for the Union

ISSUES:
1. Employee Disability 7:3200
2. Inability to Discharge Employment Obligations 7:3220
3. Qualifying for Medical Plans Outside the Agreement 8:3322

DECISION RENDERED: June 21, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: After a two year absence from work as a result of a back and an elbow injury, the Grievor was discharged. The Employer informed the Grievor that her employment had been terminated because the Workers' Compensation Board refused to pay her any further benefits and because she could not perform the light duties assigned to her on two "test" occasions. As well, based on the opinion of her own doctor, the Grievor would probably never be able to return to work unless she could lose weight which in her case appeared unlikely. The Union filed a grievance alleging that the "test" administered to determine whether the Grievor could carry out some employment was unfair and that in any event her claim for Workers' Compensation Benefits was under appeal and she should not be subject to discharge until the appeal was concluded.

AWARD: The grievance was denied. The Arbitrator was satisfied that the Employer had provided the lightest work possible and the Grievor had decided that she was incapable of performing the job. As well, he was satisfied that the Grievor's attempts at weight loss were most unlikely of success. He ruled that the "test" was a fair and reasonable assessment of the Grievor's work capacity. Therefore, on the balance of probabilities and in consideration of the Grievor's health problems, he found that she was unlikely to return to work. He ruled that the Employer was not required to maintain the employment status of a worker who had not worked for more than two years and who on all evidence was unlikely to be capable of work in the future. As well, he ruled that the Employer was not required to wait for the results of the appeal filed with the Workers' Compensation Board.

FILE NO. AA89-06-009

EMPLOYER: Storm-Tite Inc.
UNION: United Food & Commercial Workers Union, Local 111
ARBITRATOR: P.W. Schulman, Q.C.
APPEARANCES: B. Hecht, for the Employer
C. Trigwell, for the Union
ISSUES: 1. Credited Service for Vacations 8:3220
2. Seniority: Aquisition and Termination 6:1000
3. Intention of the Parites 4:2100
DECISION RENDERED: June 26, 1989
EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Union filed a policy grievance alleging that employees who were hired prior to the effective date of the first collective agreement were being denied their total seniority from the date of hire for the calculation of the vacation entitlement. As well, it claimed that employees who were periodically laid off for a few months were not being credited for periods of time in which they were on lay-off. The Employer claimed that Article 7 of the collective agreement, which dealt with seniority, did not entitle "regular" employees hired before the effective date of the first contract to credit for seniority dating back to the first day of employment. It contended that the article dealt only with probationary employees. It also stated that the collective agreement did not contain an expressed intention to confer the increased vacation benefit on employees who had been laid off during the year.

AWARD: The grievance was allowed. The Arbitrator found that Article 7 expressed an intention to make the same provision available to probationary employees as for regular employees. Moreover, the collective agreement spelled out vacation rights for employees who had completed ten or more years of continuous service during the term of the agreement which implied that employees hired before inception of the agreement were entitled to receive vacation credit for seniority dating back to the first day of employment. He also found that the collective agreement conferred the benefit of having time on lay-off count towards calculation of the vacation benefit for those employees who were laid off earlier in the year but who were back at work at the time of the calculation of vacation benefit. Such employees provide a service to the Employer because the Employer has access to a person who is trained and available when required.

FILE NO. AA89-06-010

EMPLOYER:	Motor Coach Industries Limited
UNION:	International Association of Machinists and Aerospace Workers, Lodge 1953
ARBITRATOR:	J.M. Chapman, Q.C.
APPEARANCES:	J. Scurfield, for the Employer L. Paulson, for the Union
ISSUES:	1. Rights of Recall 6:2354 2. Operation of Collective Agreements 4:1600 3. Intention of the Parties 4:2100
DECISION RENDERED:	June 28, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: During a brief plant shutdown, the Employer needed to complete some additional tasks and offered the work to employees who were less senior than those who were on lay-off. The Union filed a grievance alleging that the Employer had recalled employees out of seniority order and therefore had violated Article 21, Recall of Employees, and Letter of Understanding 6 (L.O.U. 6), Temporary Recalls to Work. It argued that it had the right to rely on verbal statements made by the Employer during negotiations that it would accept the onus to recognize seniority, to notify employees of their rights and to assemble the list of employees interested in temporary recall. It stated that the Employer did not even attempt to contact any of the laid off employees.

The Employer argued that a definitive onus did not exist for it to contact the employees as it was only to "endeavor to recall employees for temporary work." Further, the employees had not complied with provision 5 of L.O.U. 6, because they did not state their interest or leave contact points.

AWARD: The grievance was denied. The Arbitrator found that under L.O.U. 6 the Employer was to "endeavor" to recall employees for temporary periods, and there was no evidence that it had endeavored to do so. However, provision 5 of L.O.U. 6 clearly stated that any employee on lay-off interested in accepting the temporary recall for less than five days "shall file notice with the Company and shall advise of a number of points where they can be reached." Therefore, in this case, the parties had agreed in writing to specific conditions which had to be met in order for laid off employees to have temporary recall rights. Those conditions were not met by the employees. As well, he could not find that L.O.U. 6 was ambiguous, all of the verbal understandings were merged by virtue of the written agreement.

FILE NO. AA89-06-011

EMPLOYER:	University of Brandon
UNION:	University of Brandon Faculty Association
ARBITRATOR:	D.E. Bowman, Q.C.
APPEARANCES:	J. Combs, for the Employer R. Tonn, for the Union
ISSUES:	1. Job Posting 5:2520 2. Management's Duty to Act Fairly 4:2320 3. Time Limits 2:3128 4. Section 121 of The Labour Relations Act
DECISION RENDERED:	June 29, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Employer raised a preliminary objection to the arbitrability of the grievance. It claimed that the Union had violated the time limits for which the grievance was to be filed. The Union replied that it interpreted Article 6.12 to allow for 65 working days rather than 65 calendar days to file the Notice of Arbitration.

The Employer advertised a posting for a "tenure-track appointment". Between the time the advertisement was placed and the candidates were interviewed, the position was amended to a term appointment as per the guidelines of a budget committee. The Union filed a grievance alleging that the Employer violated Article 7 of the collective agreement, because it did not honour its commitment to fill the position as advertised. It also suggested that an appointment already in process could not be diverted or converted, but if it could be it could only be done on the advice of the Department.

The Employer urged that the appointment although expressed as "term", was really "tenure-track" because the appointee, at the end of the term must be considered for probationary, and later, perhaps tenured appointment. In addition, the Employer explained that the Union or Department had never determined the nature of the appointment which was a management function.

AWARD: The grievance was allowed. As to the preliminary objection, the Arbitrator could not adopt Article 6 to be read to mean "working days". However, he found that the Employer was not prejudiced from the violation and relieved against the time limits. As to the merits of the case, the Arbitrator could not find that the term appointment fell within the "tenure-track" definition set down in Article 7. He also found that the Employer had made a commitment as to the type and duration of appointment to be made. It did not have the discretion to fetter its own hands with a blanket policy allowing of no apparent exceptions. Therefore, the Arbitrator ruled that the Employer could not through the application of the new policy, attempt to undo that process and to make an appointment other than what was advertised. He ordered the Grievor be tendered with a probationary contract.

FILE NO. AA89-06-012

EMPLOYER: Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: R.K. Deeley

APPEARANCES: R.D. Cram/A. Rumak, for the Employer
T. Turcan/P. Williamson, for the Union

ISSUES:
1. Suspension 7:3542
2. Fighting, Assault 7:3430
3. Private or Public Hearing 3:2010
4. Sec. 122 of The Labour Relations Act

DECISION RENDERED: June 30, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: Due to the sensitive nature of the case, the Union requested that pursuant to section 122 of The Labour Relations Act, the hearing be held in camera. The Employer had agreed to the exclusion of members of the public at large, but was of the position that the relatives of the Complainant should be allowed to remain to provide her with moral support, and that witnesses should be allowed to remain in the hearing room after the completion of their testimony.

The Grievor was suspended for two days for allegedly kissing the breast of the Complainant, a subordinate female employee. The Grievor denied the allegation, although he did agree that on other occasions he had touched her on the leg, and patted her on the back. He suggested that the Complainant was motivated in making the complaint by her desire to secure a full-time permanent position of employment by discrediting him. The eventual result of this complaint would be the transfer of the Complainant to another department on a full-time basis.

AWARD: The grievance was denied. The Arbitrator was not convinced that the Union had discharged the onus required to change the basic principle of allowing public access to the hearing. However, had it not been for the Employer's agreement to exclude members of the public from attending, he would have been inclined to allow the public to attend, so that the process would be seen to be proper. He ruled that the relatives of the Complainant could be present throughout the hearing as their presence could not harm the Grievor. Under normal circumstances, he would have allowed witnesses to remain in the hearing room. However, due to a parallel complaint being raised to the Human Rights Commission, that hearing, and the Grievor could be prejudiced should the witnesses hear some of the sworn testimony of other witnesses. As the allegations of sexual harassment, weighing all of the evidence, anu considering the credibility of the parties and the other witnesses, the Arbitrator found that the incident did take place, and that the action constituted sexual harassment. Therefore, in view of the strong language in Article 46 of the collective agreement which indicated that such action would not be tolerated, and in view of the past record of the Grievor, he would not alter the two-day suspension.

FILE NO. AA89-07-001

EMPLOYER: The City of Winnipeg
UNION: Canadian Union of Public Employees, Local 500
BOARD: D.E. Bowman, Q.C., Chairperson
D. Kells, Nominee for the Employer
C. Trigwell, Nominee for the Union
APPEARANCES: M.S. Samphir/M.E. Cavett, for the Employer
M. Meyers, Q.C., for the Union
D. Nelko, for Han Vandenheuvel
ISSUES: 1. Promotion, Demotion and Transfer 6:2100
2. Intention of the Parties 4:2100
DECISION RENDERED: July 5, 1989
EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Union filed a grievance alleging that the Employer violated Article 4 of the Supplementary Agreement because the Grievor was not promoted to the position of Foreman III. Both the Grievor and the incumbent were Zookeepers III, the highest level in the Zookeeper classification. The Union argued that because Zookeeper III constituted the next rank junior to Foreman III, as for a number of years the positions of Foreman I and II had not existed, the promotion was to be made by line of progression from Zookeeper III and the Grievor had more seniority in that position than the incumbent.

The Employer contended that there was no line of progression as the normal line of progression would be through the Foreman I and II ranks. Since there were no persons holding the two lower Foreman ranks, the job should be awarded to the incumbent, because he had the greatest Civic Service seniority and had been a Zookeeper for at least ten years.

AWARD: The grievance was allowed. The Board did not find it necessary to rule whether the position of Zookeeper III was "next grade junior" to Foreman III, although they were prepared to do so. From the service record of the two applicants in question, there was no doubt that the Grievor served as a Foreman I and II in the past. At least for the purposes of comparative seniority, the Board found that he possessed the necessary seniority in the "next grade junior" and was entitled to the promotion. Therefore, it ordered that he be awarded the position and be compensated for the difference in salary from the date the incumbent was appointed.

DISSENT: D.H. Kells, Nominee for the Employer. Mr. Kells stated that the position was to be awarded to the individual having the most seniority within the same department who had served the longest in the same or next grade junior. Because neither the incumbent nor the Grievor were Foreman II or III, then neither was entitled to the position. However, promotions from within the department were to be given to the applicant with the greatest seniority. On a department wide basis, the incumbent had more seniority than the Grievor. Therefore, Mr. Kells would have denied the grievance. He was also of the opinion that the majority erred in considering the temporary service of the Grievor in the position of Foreman III, because the Supplementary Agreement specified permanent service.

FILE NO. AA89-07-002

EMPLOYER: Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: D.G. Baizley

APPEARANCES: R.D. Cram, for the Employer
B. Havelock, for the Union

ISSUES: 1. Equal Pay for Equal Work 8:1000
2. Compliance with the Wage Structure 5:2400

DECISION RENDERED: July 6, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was a Duty Officer at the Provincial Remand Centre which is a 24 hour, 365 day a year operation. The Superintendent and Deputy Superintendent worked regularly Monday through Friday from 8:30 a.m. to 4:30 p.m., and were to be contacted in the event of an emergency regardless of the day or hour. The Grievor sought supervisory pay for the period of time that he was the Duty Officer in charge when either the Superintendent or Deputy Superintendent were physically absent from the Centre. The Union claimed that he was entitled to the extra pay as per Article 10.01 of the collective agreement which provided that the Duty Officer "temporarily assigned the supervisory duties of a higher classification in the absence of the incumbent in that position ... shall be paid at the rate of pay for the higher classification." It also presented other documents which stated that the Duty Officer would assume the responsibility and authority of the Superintendent and Deputy Superintendent upon their absence.

The Employer argued that there was neither a temporary assignment of supervisory duties nor an absence of the incumbent. The supervisory duties for which additional compensation was being sought was inherent in the position of a Duty Officer as per the "chain of command" and "Position Description". As well, "in that position" in article 10.01 referred to the position of employment within the government, and not the overnight absence for which the Grievor was requesting compensation. In addition, the Superintendent or the Deputy were to be contacted in case of emergency, so they were not "absent from the position."

AWARD: The grievance was denied. The Arbitrator was persuaded by the argument of the Employer and ruled that the Grievor was not entitled to any compensation.

FILE NO. AA89-07-003

EMPLOYER: Winnipeg Free Press
UNION: Media Union of Mantioba, #M-38
ARBITRATOR: P.S. Teskey
APPEARANCES: G.D. Parkinson, for the Employer
V. Matthews Lemieux, for the Union
ISSUES: 1. Discharge 7:3542
2. Incompetence 7:3510
3. Rehabilitative Potential 7:4422
4. Compliance with the Grievance Porcedure 2:3120
DECISION RENDERED: July 7, 1989
EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a District Manager, had received a number of written and verbal warnings concerning his improper response to serious service complaints, his disregard for company policy, his unacceptable handling of subscribers and carriers, his falsification of reports, and his unacceptable sales effort. After a few months, when his performance did not meet the minimum standards, he was discharged. The Union filed a grievance alleging that the discharge was unjustified. It argued that although the Grievor did not meet the job standards, he had 20 years of service and his performance did not improve because he had to deal with a backlog of work from when he was off on one week sick leave. It also considered the termination meeting to be deficient as neither the Grievor nor the Union were aware of its purpose until the conclusion of the meeting.

The Employer argued that whether the Grievor chose not to do the job or was just unable to get it done, the discharge was proper. A suspension would serve no purpose as the conduct occurred over a long period of time. As well, the Grievor was adeouately informed of the Employer's concerns and was given adequate opportunity to improve. Although the job was difficult, other employees were performing to a satisfactory level.

AWARD: The grievance was denied. The Arbitrator found that the standards set by the Employer were not unreasonable and had not been suddenly tightened. As well, he was satisfied the Employer's complaints were justified and that the Grievor was aware of the serious level of dissatisfaction with his overall job performance and the need for general improvement. He did not find problems with the meeting, although he stated that a better practice would have been to state the purpose of the meeting at the outset. The Grievor's illness was not found to be a mitigating factor because his job performance did not improve before he was sick. Also, the Grievor had to be aware of the consequences if his performance did not improve and was unlikely to learn from another opportunity. Therefore, in view of the Grievor's consistent and continuous pattern of deficient performance, the number of warnings he had been given, the importance his position played on the Employer's relationship with the public and carriers, the Arbitrator found that a short suspension would not serve any useful purpose and ruled that the discharge was justified.

FILE NO. AA89-07-004

EMPLOYER: INCO Ltd.

UNION: United Steelworkers of America, Local 6166

ARBITRATOR: W.D. Hamilton

APPEARANCES: J.M. Christiansen, for the Employer
R. Schmidt, for the Union

ISSUES:
1. Discharge 7:3542
2. Intoxicants 7:3560
3. Failure to Co-operate 7:3580
4. Admissibility of Evidence 3:4000
5. Rehabilitative Potential 7:4422

DECISION RENDERED: July 11, 1989

EXPEDITED ARBIRTATION: Yes

CIRCUMSTANCES: The Grievor had been on sick leave and enrolled in the Employee Assistance Program so that he could resolve a chemical dependency problem that was affecting his work performance. After he repeatedly did not comply with certain rehabilitative conditions, the Grievor agreed in writing that if he failed to adhere strictly to six conditions, he would be discharged. Two months later, the Grievor's blood and urine samples tested positive for marijuana. In consideration of the test results, the Grievor's prior history and its attempts to deal with the Grievor's problems, the Employer discharged him for breach of the conditions of his employment. The Union filed a grievance alleging that the Grievor was discharged without just cause. It argued that there was no culminating incident, and the past record could not be considered. In addition, it questioned the extent that the letter was binding on the Grievor and itself. Finally, it argued that the drug test was inadmissible because the parties had not agreed in the letter to administer urine tests. It also had difficulties with the accuracy of the test.

AWARD: The grievance was denied. The Arbitrator found the conditions imposed by the Employer were reasonable. He also found that the letter was not invalid or illegal, because the Union never filed a grievance claiming that it was invalid or imposed improper conditions. As to the issue of the urine tests, although the letter did not specify urine tests, the Union was aware that effective one month after the letter was signed, urine tests would be needed in addition to the blood samples, and it had not grieved that requirement. The Arbitrator found, on the balance of probabilities, that the Grievor used drugs following the issuance of the letter. He did not base his finding on the medical evidence as he found it to be hearsay and inadmissible, but rather that the Grievor did not deny he had taken drugs, and did not produce any evidence at the hearing to contradict the test findings. This breach of one of the stated conditions of employment constituted cause in that it was a culminating incident which allowed the Employer to take action. Therefore, the Employer was justified in reviewing the Grievor's employment status in light of his prior history and record. He also found that the Employer discharged the Grievor only after it had taken reasonable and progressive steps to allow the Grievor to rehabilitate himself. As a result, he ruled that the Employer had just cause to discharge the Grievor.

FILE NO. AA89-07-005

EMPLOYER: INCO Limited

UNION: United Steelworkers of America, Local 6166

ARBITRATOR: P.S Teskey

APPEARANCES: R. Hansell, Q.C., for the Employer
K. Oleksiuk, for the Union

ISSUES:
1. Standard of Review of Disciplinary Action 7:5020
2. Collective Agreement Limitations 2:3100
3. Discharge 7:3542
4. Intention of the Parties 4:2100
5. Sec. 79(3) of **The Labour Relations Act**

DECISION RENDERED: July 12, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who was a probationary employee, had been employed for seven weeks when he was given written notice of discharge because he was considered to be an unsatisfactory employee. The Union filed a grievance alleging that the discharge was unjust. The Employer raised a preliminary objection as to the arbitrability of the grievance because as per Article 15.03 of the collective agreement and subsection 79(3) of **The Labour Relations Act**, a termination of a probationary employee was not reviewable under the grievance procedure. The Union acknowledged the procedural denial of a probationary employee to grieve a matter. However, it argued that this was not a denial of the substantive just cause standard.

AWARD: The grievance was denied. The Arbitrator found that article 2.01 did provide a substantive right of dismissal solely for just cause to employees. This right was modified in article 18.01 which not only reaffirmed the right of non-availability of discharge without just cause, but also defines which employees to whom the right would apply. Reading the agreement as a whole, the Arbitrator could not find intent to confer the right of discharge solely for just cause upon probationary employees. Rather the parties did not intend the right to exist. This interpretation was consistent with past practice and with the nature and purpose of a probationary period. He found that article 18.01 was sufficient to provide the language of section 79(3) that the just cause standard was not to apply to probationary employees. Therefore, he ruled that the grievance was inarbitrable.

FILE NO. AA89-07-006

EMPLOYER: Acme Chrome Furniture Ltd.

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local 3

BOARD: J.M. Chapman, Q.C., Chairperson
W.D. Hamilton, Nominee for the Employer
J. Silver, Nominee for the Union

APPEARANCES: B. Hecht, for the Employer
S. Spratt, for the Union

ISSUES: 1. Credited Service for Vacations 8:3220
2. Computation of Vacation and Vacation Pay 8:3230
3. Sec. 6(4) of The Vacations With Pay Act

DECISION RENDERED: July 13, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was first hired in August 1967, claimed he was entitled to five weeks of vacation rather than the four weeks he was given. The Employer denied his claim because the Grievor's anniversary date was five weeks past the established June 30th cut-off date, which although not specified in the collective agreement was a widely known policy. Therefore, he did not possess 21 years of service to qualify for the five weeks vacation as stated in clause 8.02 of the collective agreement. It also argued that as per Article 9.03 of the collective agreement, seniority was determined on the basis of the date of hire. As well, subsection 6(4) of The Vacations With Pay Act provided that vacation would be calculated based on the date employment commenced or the date the employee became entitled to an annual vacation under the Act.

AWARD: The grievance was denied. The Arbitrator found the collective agreement was not ambiguous, because article 8.02 clearly stated that an employee with 21 years of service was entitled to 5 weeks of vacation. The agreement also provided for a plant shut-down during which vacations would be taken. He stated that the starting date of the vacation period was the significant date and not June 30th. He did state, ex gratia, that past practice established June 30th as the cut-off date. However, in this case, the vacation period commenced July 15th. At that time, the Grievor had not completed the requisite number of years of service to be entitled to the five weeks of vacation and accordingly was not entitled to that level of vacation.

DISSENT: J. Silver, Nominee for the Union. Reasons not included.

FILE NO. AA89-07-007

EMPLOYER: Bristol Aerospace Ltd.

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local 5

ARBITRATOR: C.B. Cramer, Q.C.

APPEARANCES: K.L. Lercher, for the Employer
S.G. Soronow, for the Union

ISSUES:
1. Senior Employee if Relatively Equal 6:3220
2. Ability and Qualifications: Criteria 6:3300
3. Education and Experience 6:3320
4. Promotional Opportunities 9:1520

DECISION RENDERED: July 17, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, an employee with 21 years of seniority, applied for, but was denied the position of Aircraft Inspector. The position was awarded to an aircraft assembler who only had 2 months of seniority. Neither the Grievor nor the incumbent were formally interviewed for the position. The Union filed a grievance alleging violation of Article 22.01 of the collective agreement which provided that if an internal applicant was chosen and, provided all else was relatively equal, the most senior applicant would be chosen. The Employer argued that it had selected the most skillful and able employee. In addition, it stated that the Grievor was absent quite often due to union business and required more than average supervision as a result of his involvement with those duties. It stressed the importance of the Inspector's regular attendance whose absence could result in costly delays because an airplane could not leave the hanger without the Inspector's approval.

AWARD: The grievance was allowed. The Arbitrator found that the Employer had only performed a superficial examination of the qualifications of the candidates. No objective tests were applied to either candidate to ascertain the level of their respective knowledge and ability and the selection criteria were unspecified. She also found that the incumbent's skill and ability were unproven and his training and practical experience had occurred 8 years earlier with a substantial gap in his contact with aircraft. Although, as emphasized by the Employer, the incumbent had superior technical training, the Arbitrator found that the differences between the candidates were insufficient to defeat the application of the seniority provision. She stated that although absenteeism was a relevant factor in assessing qualifications, it was insufficient by itself to have denied the position to the Grievor. Therefore, she ruled that the Grievor was entitled to have his seniority rights prevail and should be awarded the position.

FILE NO. AA89-07-008

EMPLOYER: University of Manitoba

UNION: Canandian Association of Industrial, Mechanical and Allied Workers, Local 9

ARBITRATOR: D.E. Bowman, Q.C.

APPEARANCES: P.C. Suche, for the Employer
S.G. Soronow, for the Union

ISSUES:
1. Procedural Requirements 7:2100
2. Warnings and Suspensions 7:3542
3. Prior Award 2:3220
4. Sec. 121 of The Labour Relations Act

DECISION RENDERED: July 17, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: As ordered in a previous arbitration award, the letter of suspension which had been issued to the Grievor as a result of allegations of sexual harassment was rescinded. The Employer then reissued the letter as a letter of warning. The Union filed a grievance alleging that the article 23, Warnings, of the collective agreement was violated. It argued that as the initial suspension was a nullity, it could not be invoked under another name. Therefore, the letter of warning was itself a nullity. Alternatively, it submitted that the procedures required under article 23 were not followed, and could not have been followed when the letter of warning was sent. Specifically, it stated that the letter did not outline the specifics of the problem, the proposed or expected solution, nor any proposed time period for the improvements. As well, no meeting was held with the Grievor to review the contents of the letter at the time of issue of the original or revised letters. Under the article, a review was also to be conducted every three months until the letter was removed and no such meeting had been conducted. Finally it argued that the letter had expired because written confirmation had not been, nor could be given within the six month time frame stipulated in article 23. The Employer countered that it was impossible to the follow the steps outlined in article 23. However, it argued that an arbitrator was entitled to relieve against procedural failures under section 121 of The Labour Relations Act.

AWARD: The grievance was allowed. The Arbitrator found that the rights conferred under Article 23 were substantive, and therefore not subject to relief under the Act. Therefore, he ruled that the Employer could not retroactively act under Article 23, when the necessary steps to be taken were impossible to comply with by virtue of the time having already gone by. As well, he ruled that the reissued letter was not a letter of warning in itself, but was simply the original document, which was a nullity, renamed. Therefore, he ruled that letter of warning was a nullity and ordered all reference to it be removed from the Grievor's file.

FILE NO. AA89-07-009

EMPLOYER: Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: E.W. Olson, Q.C., for the Employer
R. Tonn, for the Union

ISSUES:
1. Suspension 7:3542
2. Insufficient and/or Careless Work 7:3520
3. Refusal to Follow Instructions 7:3610
4. Merit Increases 8:2310
5. Reasonableness of the Penalty 7:4300
6. Section 3 of The Labour Relations Act

DECISION RENDERED: July 17, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a Medical Examiner Investigator, was viewed by the Employer as not having a good relationship with other employees and of having difficulty communicating. It also complained that she did not comply with office procedures, and that she was gathering confidential office documents for use against itself and other employees. When she would not accept fault when a number of confidential medical reports for which she was responsible were found blowing in the parking lot, a letter of reprimand was placed in her file. She was asked to attend her supervisor's office to review the matter, but refused because she was not allowed to have Union representation at the meeting. As a result of her refusal to attend, she was suspended for insubordination. Her employment was ultimately terminated after she refused to attend the Employees' Assistance Plan under the suggestion of the Employer, and in view of her previous record.

The Union filed three grievances. The first grievance alleged that the Grievor was unfairly reprimanded and unjustly suspended relating to the confidential documents being found in the parking lot. The second grievance alleged unjust denial of a merit increase. The third grievance claimed that the dismissal was unjust. The Union noted that many of the incidents referred to in this case had been investigated and the Grievor was found blameless, and the incidents could not be brought up to "haunt" her. As well, it argued that no evidence was presented to show that the Grievor was not productive. It also stated that the Grievor could not be faulted for keeping a record against the Employer and other staff, because they were maintaining a record against her. Specifically to the incident with the papers found in the parking lot, the Union submitted that the Employer's actions represented the unfair manner in which the Grievor was treated. At first, the matter was deemed to be resolved. Later, a reprimand was issued because an outsider complained. In addition, it denied that the refusal to attend the meeting was insubordination. Although technically she was not entitled to have a Union representative present at the meetings, she genuinely believed she was and nothing would have been lost by giving her that opportunity. In any event, no warning had been given to the Grievor that her employment was in jeopardy and no culminating incident had occurred to allow her past record to be examined.

The Employer stated that the documents it had accumulated came from outside sources and resulted from the actions of the Grievor, while she was gathering confidential office documents. It disputed that it had changed grounds or imposed a double penalty. It explained that the supervisor had informed the Grievor that the matter would be finished if it did not proceed further, but it did proceed further. It agreed that some of the incidents considered had been resolved in the Grievor's favour, however, it was of the opinion that they were worthy of consideration if discipline was found to be justified.

AWARD: The first grievance was allowed in part. The Arbitrator was satisfied that the letter of reprimand was reasonable as the documents, which were of an extremely sensitive nature, were found in a public place and were the responsibility of the Grievor. As to the allegation of insubordination, he found that the Grievor reasonably expected some disciplinary action would take place at the meeting and although technically she was not entitled to have a Union representative present at her meeting, due to her anticipation concerning the potential for discipline, she was justified in having a representative present. Therefore, in this case, she did not refuse to meet with her superior, but only wanted someone to appear with her. The Arbitrator ruled that her actions were not insubordinate and ordered that the suspension be cancelled, but that the reprimand remain on the Grievor's record.

The second grievance was denied. From the evidence presented, the Arbitrator found that the Grievor at the relevant time of the employment review was not providing satisfactory service. He could not find that the Employer had acted in an unreasonable or discriminatory manner. Accordingly, he ruled that the Grievor was not entitled to receive her merit increase.

The third grievance was denied. The Arbitrator was satisfied that the Employer had proved that the behaviour of the Grievor did indeed "manifest the purported attitude" which disabled her from the proper performance of her job. Therefore, he ruled that some form of discipline was warranted. He found that the rules of progressive discipline had been followed. He found that she was unwilling to comply with policies and directives, knew the her Employer was dissatisfied, and showed no willingness to change or to acknowledge any wrongdoing on her part. Therefore, he ruled that the Grievor's relationship with her superior and her co-workers had deteriorated to the extent that she would be unable to effectively function in her duties, and that the Employer had just cause to discharge her.

FILE NO. AA89-07-010

EMPLOYER: City of Winnipeg

UNION: Canadian Union of Public Employees, Local 500

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: M. Samphir/M.E. Cavett, for the Employer
R. Tonn, for the Union

ISSUES:
1. Non-disciplinary Demotion 7:3546
2. Disciplinary Demotion 7:3544
3. Multiple Penalties 7:4240
3. Insufficient and/or Careless Work 7:3520

DECISION RENDERED: July 18, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a Water Supply Worker, was given a permanent non-disciplinary demotion to the position of Skilled Labourer. The demotion was a result of his poor work performance, in particular, his carelessness while changing water meters causing flooding in customers' basements, and because he had left his van running, unattended, and facing the wrong way on the street. The demotion was appealed to the Board of Commissioners which ordered that the demotion should only be for a six month period. The Union filed a grievance alleging that the temporary demotion constituted excessive disciplinary action by the Employer. It also submitted that because the Grievor had been given an "Employee Disciplinary Report" after one of the flooding incidents, he had already been disciplined, and the Employer could not discipline him twice.

AWARD: The grievance was denied. The Arbitrator found that the Board of Commissioners' action, which is the final action and which must reflect the official position of the Employer despite what the departmental officials believed, was of a disciplinary character. If the Employer thought the Grievor incapable of performing the job of Water Supply Worker, then the demotion should have been permanent. As well, a non-disciplinary demotion for a short term would generally include a training program or a retesting which did not occur in this case. Nevertheless, the Arbitrator ruled that the Employer had satisfied the onus to establish that some kind of discipline was warranted. In this case, there were a succession of situations, numerous and progressively serious. Therefore, the Arbitrator ruled that the demotion was not excessive or harsh, and was a justified and an appropriate response. He also found that the "disciplinary reports" did not constitute the imposition of discipline as defined in the collective agreement because they were divisional reports. Therefore, he ordered them removed from the employment record.

FILE NO. AA89-07-011

EMPLOYER: Dominion Bridge - Winnipeg (Dublin)
UNION: United Steelworkers of America, Local 4095
ARBITRATOR: J.M. Chapman, Q.C.
APPEARANCES: K. Lercher, for the Employer
A. Rivers, for the Union
ISSUES: 1. Proprietary Rights to Overtime 5:3220
2. Intention of the Parties 4:2100
3. Probationary Employees 7:5000
DECISION RENDERED: July 20, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Union filed a grievance alleging that the Employer was in violation of the collective agreement because it scheduled an Apprentice Industrial Mechanic to work overtime as a Fitter-Welder for two days rather than the Senior Fitter-Welder. The Union argued that Article 21.01 of the collective agreement provided that the two positions were distinct. As well, as per article 9.03(c), apprentices did not have the right to do other jobs and could only work in the field in which they were being trained. The Employer stated that article 9.03 only dealt with lay-off and recall and no mention was made with respect to overtime. As well, the collective agreement did not restrict an apprentice from holding the "rights" to other positions. It also submitted that the apprentice was selected because of his experience, his abilities and was qualified to act and held "rights" as a Fitter-Welder. In addition, it stated that the Fitter-Welders who were performing the job during the week were offered the overtime, but refused to work the hours.

AWARD: The grievance was denied. The Arbitrator found that past practice was to use Fitter-Welders for tie-down work, but evidence did not exist as to what transpired during overtime. He also found that the collective agreement did not restrict to whom overtime was to be offered. As to the interpretation of article 9.03, the Arbitrator could not accept the Union's contention that an apprentice loses his or her rights to work at other positions for which they have status while they are training in another trade. In this case, he found that the individual performing the work was a qualified Fitter-Welder. He stressed that the work being done was overtime and that it had first been offered to other Fitter-Welders who were unwilling to accept the work, and that the apprentice held the recognized status and was experienced in the required work.

FILE NO. AA89-07-012

EMPLOYER: Manitoba Health Care Facilities (North)
UNION: Manitoba Organization of Nurses' Associations
ARBITRATOR: M.H. Freedman, Q.C.
APPEARANCES: V. Rachlis, for the Employer
R. Deeley, for the Union
ISSUES: 1. Suspension 7:3542
2. Intoxicants 7:3560
DECISION RENDERED: July 21, 1989
EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, a Registered Nurse, allegedly reported for work under the influence of a prescribed drug which causes drowsiness. Two days later, based upon complaints received from her co-workers and supervisor, the Employer imposed a five-day suspension for knowingly reporting to work under the influence of drugs. The Union filed a grievance alleging that the suspension was without just cause. The Grievor claimed that she was not impaired, but was only tired, and was capable of carrying out her duties. She explained that because she had recently returned to work after a sick leave of two months and did not have any sick leave remaining, she felt that she might be fired if she went home so soon after returning to work. The Union argued that there was absolutely no suggestion that the Grievor had done anything wrong, other than to come to work when she was not feeling well. It submitted that the Grievor had made no medication or charting errors and the doctors on duty had no complaints about her. As well, it suggested that because the witnesses failed to report the alleged incidents promptly, and because the supervisor did not send the Grievor home during the day and allowed her to work out her shift, that they did not view the conduct of the Grievor to be as serious as their testimony would suggest.

AWARD: The grievance was denied. The Arbitrator found that the testimony of the witnesses was credible. He was satisfied that the Grievor was more than tired and was suffering from the effects of the drugs that had been medically prescribed for her. Accordingly, she should not have reported to work. He stated that the fact that no patient suffered nor that any medication or charting errors occurred was irrelevant. He found that the Grievor's responsibility was to the patients, and her being at work in her condition presented an unacceptable situation which introduced unacceptable risks for the Employer to bear. Therefore, he ruled that the five-day suspension was fair and reasonable.

FILE NO. AA89-07-013

EMPLOYER: New Flyer Industries Ltd.

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local 9

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: K. Lercher, for the Employer
S. Spratt, for the Union

ISSUES:
1. Prior Award 2:3220
2. Familiarization Periods 6:3230
3. Examinations and Tests 6:3340

DECISION RENDERED: July 25, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: In a previous arbitration award, the Arbitrator had ruled that the Grievor had not been adequately prepared for a test for the position of Plant Stockkeeper at the Fort Garry plant, because he was unfamiliar with the operations at the Fort Garry plant as he worked at the Pandora plant. He ordered the Employer to retest the Grievor for the position. By the time the new test was administered 21 months later, the Fort Garry plant had been closed and the operations were consolidated at the Pandora plant. The Grievor was given a copy of the test, which was to be administered at the Pandora plant, was told he would have to obtain 100% to pass, and was given a familiarization period in the raw materials area. When the Grievor was advised that he had failed the test, a grievance was filed alleging that the test was not administered in accordance with the previous award. The Union argued that a minimum mark of 100% was unrealistic and had not been agreed to by the Union. As well, it argued that the Grievor had not been given a proper familiarization period for the paperwork aspect. It also submitted that the marking of the test was not fair as a Union representative was not present. The Employer contended that the Testing Committee had equal representation from each side, and that no complaints had been raised until the Grievor was told he failed the test. It emphasized that the Grievor was given ample opportunity for familiarization and noted that he had worked in the Pandora plant, and therefore this was not the same situation in the previous award where the Grievor was not familiar with the plant. As to the requirement for 100% mark, it submitted that this was fair and nevertheless, the Grievor did not come close to obtaining a perfect score.

AWARD: The grievance was denied. The Arbitrator was of the view that the 100% passing grade was unrealistic, but that was not an issue as he found that the Grievor was obviously lacking in the expertise with respect to the paperwork which he found was a vital component of an industrial plant. He did not find any fault with the administration or marking of the test, and was satisfied that adequate preparation was afforded to the Grievor.

FILE NO. AA89-07-014

EMPLOYER: New Flyer Industries Ltd.

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local 3

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: K. Lercher, for the Employer
S. Spratt, for the Union

ISSUES: 1. Allocation of Overtime Within the Group 5:3224
2. Estoppel 2:2200

GRIEVORS: Sarmiento/Gutierrez/Morcilla/Smyth/Redlick

DECISION RENDERED: July 26, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Union filed five grievances alleging that the Employer violated Article 18 of the collective agreement and its past practice, because the Grievors, who were on the stub line, were not asked to work overtime on a particular Saturday on the bench electrical line. The Union submitted that since the date of the collective agreement, bench electrical and stub line electrical were regarded as one department. As well, all of the Grievors worked in both areas, and were qualified to do so. It argued that in the past the overtime was distributed among everyone in those areas as one department and on the basis of seniority. In its view, the Employer had violated the collective agreement and was estopped from changing its practice. The Employer stressed that as per article 18.10 of the collective agreement, overtime on the first and second days of rest was to be offered on a designated basis to employees in each department. As of October 1988 with the change in supervisors, there were two separate departments and whatever had transpired in the past was irrelevant.

AWARD: The grievances were allowed. The Arbitrator found that until October 1988, two-thirds into the term of the collective agreement, the two groups were treated as one department and that one combined list was maintained for members of each section for the purposes of allocating overtime on a seniority basis. He found no evidence to suggest that there were any substantial changes in the operation of the two areas after October 1988. In view of the clearly established past practice which existed for over two-thirds of the collective agreement, and further in view of the conclusion that there was no substantive change in the work done in each area, he concluded that the employees were working in the same department for the purposes of article 18.10. Past practice clearly showed that the word "department" included both areas of bench and line. It would be patently unfair, at least during the duration of the collective agreement, to deprive those employees of the opportunity to work overtime as they had previously experienced during two-thirds of the term of the agreement. If there were to be any changes, they should be negotiated and should not be imposed unilaterally.

FILE NO. AA89-07-015

EMPLOYER: St. James-Assiniboia School Division, No. 2

UNION: St. James-Assiniboia Teachers Association, No. 2
of the Manitoba Teachers' Society

BOARD: J.M. Chapman, Q.C., Chairperson
R. Simpson, Nominee for the Employer
R. Deeley, Nominee for the Association

APPEARANCES: G.D Parkinson/K. Lercher, for the Employer
M. Myers, Q.C., for the Union

ISSUES: 1. Resignation 7:7100
2. Employee's State of Mind 7:4424
3. Suspension, Discharge 7:3542

DECISION RENDERED: July 26 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: When the Grievor, a Guidance Teacher, became aware that he was being investigated for allegedly sexually harasssing a student, he informed the Employer that he would be absent for a day to clear up the matter. A week later he called to inform the Employer he was in Florida, but indicated that he was coming back. When the Employer had not heard from the Grievor three days later, it sent a notice informing him that his contract would be terminated as he was absent without leave. It was unable to serve the notice as the Grievor had gone to England. Since the Employer did not know when or if he would return, it terminated his contract and suspended him from the day he left until the date of termination. The Union filed a grievance alleging that the suspension was unjust and that there was no cause for termination. It said that the Grievor was not rational at the time, and the principles of abandonment could only apply to rational individuals. The Employer stressed that although the Grievor may have believed he was on sick leave, he did not have permission and had not provided a medical certificate to prove that he was ill. It argued that he could not arbitrate the matter as he abandoned his position. Nevertheless, the Employer had just cause to discharge him as he was not at work and had not shown any reason which justified his absence.

AWARD: The grievance was denied. The Board found that the Grievor only wanted one day off to investigate and clear up matters and that he was aware that the Employer was trying to contact him. As well, the only medical evidence presented did not specify any illness or disability. Although he was undoubtedly under stress from the investigation and other personal problems, the Board ruled that his actions were consistent with someone who abandoned his position. Even if he did not abandon his position, the Employer was entitled to discharge him for being absent without leave as per article 5.08(a) of the collective agreement.

DISSENT: R.K. Deeley, Nominee for the Union. Mr. Deeley found that, although the Grievor was absent without leave, he was under a considerable degree of stress as evident from his bizarre conduct. In his condition, the Grievor could not make a subjective decision to abandon his position. Mr. Deeley would have found that because the Employer was detrimentally affected by the lack of communication on the part of the Grievor, the suspension was justified. However, because of mitigating circumstances, the termination was not justified and he would have reinstated the Grievor subsequent to the suspension.

FILE NO. AA89-07-016

EMPLOYER: Fisons Western Corporation

UNION: United Food and Commercial Workers, Local 111

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: J. Palamar, for the Employer
C. Trigwell, for the Union

ISSUES: 1. Burden of Proof 7:2300
2. Suspension 7:3542
3. Personal [Act] Detrimental to Production 7:3570

GRIEVORS: B. Kiedyk/T. Lewandiwsky/W. Wagner

DECISION RENDERED: July 26, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievors' supervisor went to the area in which they were assigned to work, but could not see them. When he called for them, two of the Grievors walked from behind a pile of waste bales, while the third, scrambled over the top. The waste bale area was not part of the assigned work area. Two days later, they were suspended for three days for allegedly loafing. When they tried to explain their behaviour, they were told to save it for the grievance procedure. Subsequently, a grievance was filed which claimed that the suspensions were unjust as the Grievors were not loafing. The Grievors testified that two of them had gone behind the bales to relieve themselves. The third testified that he had just returned from the maintenance shop when the supervisor called for them.

AWARD: The grievance was allowed. The Arbitrator found that the facts presented did not establish that the Grievors, who had been employed for between eight and fourteen years and had good records, were avoiding the performance of their duties. He also noted that if they had been given the opportunity to explain their behaviour, many aspects of their story could have been verified. He was not satisfied that the Employer had met its onus to show that a disciplinable offence had been committed. Therefore, he ruled that the Grievors were to be reimbursed for any wages and benefits lost as a result of the suspension and any notation of the incident be removed from their records.

FILE NO. AA89-07-017

EMPLOYER: Boeing of Canada Ltd.

UNION: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, Local 2169

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: M. Christiansen, for the Employer
R. Tonn, for the Union

ISSUES:
1. Insubordination 7:3600
2. Mitigating Factors 7:4400
3. Suspension 7:3542
4. Company Rules 4:1500

DECISION RENDERED: July 31, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, a Quality Control Inspector, brought a cup of coffee into the assembly department but in the area occupied by the quality control desk. When the supervisor of the assembly department told him that drinking coffee was not permitted for safety reasons, he refused to leave and said that he could drink it where he wanted. He also argued that the supervisor had no right to enforce the rules against him as he was in the quality department. The situation became heated and the Grievor yelled and swore at the supervisor. It was also noted the the Grievor was not wearing safety shoes as required by company rules. The Grievor left the area and returned wearing his shoes. The supervisor then asked him why he was in the area as he was not on duty in that department. The situation continued to deteriorate. The Grievor swore at the supervisor and invited him to "go outside and settle the dispute." As a result of the incident, the Grievor was suspended for ten days because he was insubordinate, used abusive language, threatened a supervisor, and disregarded company rules. The Union filed a grievance claiming that the penalty imposed was too harsh, because the Grievor had acted completely out of character. The Employer stated that even though it had the grounds to discharge the Grievor, it had recognized his good record and only imposed the minimal sentence for the offenses committed.

AWARD: The grievance was allowed in part. The Arbitrator found that the Grievor had breached safety rules and had acted in an insubordinate manner. His stubbornness to comply with the supervisor's request caused the incident to escalate to the possibility of a physical altercation. Although he found that discipline was warranted, in consideration of the Grievor's unblemished record and that the incident was out of character, he ruled that the ten-day suspension was excessive. Therefore, he ordered that the suspension be reduced to five days.

FILE NO. AA89-07-018

EMPLOYER: Victoria General Hospital

UNION: Victoria Nurses M.O.N.A., Local 3

BOARD: J.M. Chapman, Q.C., Chairperson
E.W. Olson, Q.C., Nominee for the Employer
C. Derham, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
R. Deeley, for the Union

ISSUES: 1. Work Hours and Shifts 5:3100
2. Express Prohibitions in the Agreement 5:2200
3. Duty to Mitigate 2:1412

DECISION RENDERED: July 31, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a part-time Registered Nurse, grieved that the Employer violated articles 3401 and 1501 of the collective agreement, because it cancelled three additional available shifts for which she had been scheduled. The shifts were worked by a recently hired full-time nurse. The Union submitted that as per article 1501, once a shift was posted it could not be altered unless by consent. It argued that the Grievor had not been told that her hours were contingent on a vacancy not being filled. The Employer stated that article 1501 related to the hours originally scheduled and not for additional shifts which could be cancelled by either party without penalty. In addition, it noted that the Grievor had been offered to work the following day, but did not accept the shift and accordingly refused to mitigate her loss.

AWARD: The grievance was allowed. The Board found that the agreement was clear that once posted a shift, whether a regular or an additional shift, could not be changed except by mutual agreement between a nurse and the Employer. As well, it found that the shifts were not assigned on the basis of any particular contingency, or at least on any known to the Grievor. Therefore, it ruled that the Employer breached the collective agreement by unilaterally cancelling those shifts. It did not agree with the Employer's argument that the Grievor failed to mitigate her loss. It noted that it was a different shift that was offered, it was offered at short notice, and she had been told a few hours earlier that her scheduled shifts were no longer available. Therefore, it ordered that the Employer should compensate the Grievor, as per article 1405, for three hours of basic pay for each of the three days.

DISSENT: E.W. Olson, Nominee for the Employer. Reasons not included.

C. Derham, Nominee for the Union, partial dissent. Mr. Derham disagreed with the compensation awarded. He would have awarded all wages lost, because the hours were not cancelled due to a lack of work, but because the Employer unilaterally decided to give the shifts which rightfully belonged to the Grievor to the newly hired nurse.

FILE NO. AA89-08-001

EMPLOYER: Westfair Foods Ltd.

UNION: Manitoba Food & Commercial Workers, Local 832

ARBITRATOR: F.M. Steel

APPEARANCES: G. Mitchell, for the Employer
R. Ziegler, for the Union

ISSUES:
1. Work Hours and Shifts 5:3100
2. Senior Employee if Relatively Equal 6:3220
3. Estoppel 2:2200
4. Extrinsic Evidence 3:4400
5. Intention of the Parites 4:2100

DECISION RENDERED: August 3, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: A junior employee, who fried doughnuts, was being scheduled for more hours than the Grievor, who was a senior part-time cake decorator. The Union filed a grievance alleging that the Employer had violated Article 19.13 of the collective agreement because "in scheduling ... preference in available hours of work shall be given to senior part-time employees within their department." In addition, the Union contended that the Employer violated Article 19.14(d), because the Grievor was not scheduled for her minimum guarantee of hours. The Union argued that the Grievor was qualified to fry doughnuts, and therefore, the Employer was obliged to give her more hours than all junior employees in the department.

The Employer contended that the relevant provision of the collective agreement contained a latent ambiguity and introduced extrinsic evidence to show that the phrase "in the department" was to be qualified by the implied phrase "in the department and within the same classification." It stated that as a result of a previous grievance, instructions were issued to the supervisors to prevent scheduling between classifications. It contended that this established a past practice whereby work was scheduled by department and classification only.

AWARD: The grievance was allowed. The Arbitrator stated that extrinsic evidence must demonstrate consensual conduct in order for the Union to be estopped. In this case, the Union's silence did not create the necessary consent, and she rejected the estoppel argument. In addition, she held that Article 19.13 was clear and unambiguous. She also held that it was a competitive test. She found that it provided that a junior employee could not be scheduled to work more hours than a senior employee in the department, regardless of classification, unless the junior employee had greater fitness and ability. The Arbitrator ruled that the Grievor had the necessary ability to do the job, but she did not have evidence to determine her ability in relation to other junior employees. She directed the parties to determine who had the greater ability and fitness. She further found that Article 19.14 provided that the top 40% of part-time employees in the store, and not in each department, were guaranteed a minimum of 12 hours to the extent practicable and subject to business requirements. She also left it to the parties to determine if it would have been practicable to schedule the Grievor for the minimum during the period in question.

FILE NO. AA89-08-002

EMPLOYER: Burns Meats
UNION: United Food and Commercial Workers, Local 111
BOARD: D.E. Bowman, Q.C., Chairperson
R.E. Simpson, Nomine for the Employer
P. Moist, Nominee for the Union
APPEARANCES: G.D. Parkinson, for the Employer
C. Trigwell, for the Union
ISSUES: 1. Measurement of Probationary Period 7:5010
2. Arbitrability: Parties 2:3110
3. Intention of the Parties 4:2100
DECISION RENDERED: August 4, 1989
EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Union filed a grievance claiming unjust discharge. The Employer raised a preliminary objection claiming that the Grievor was a probationary employee and as per the collective agreement had no standing to grieve the dismissal. The Union conceded that the collective agreement provided for a probationary period of 50 "scheduled days of employment" and the Grievor had worked less than 50 regularly scheduled days. However, because of company policy, junior employees were required to work overtime when sufficient numbers of senior employees failed to volunteer for such work. As a result, the Grievor was required to regularly work weekends. The weekend overtime was seen as being scheduled because employees were told of such work in the middle of the week. It argued that if the overtime was included, the Grievor would no longer have been considered a probationary employee and his grievance could be heard.

The Employer argued that the provisions of the collective agreement were perfectly clear and excluded overtime from the 50 day calculation. It noted that other parts of the collective agreement and various schedules distinguished between overtime and "scheduled days." As well, it suggested that the Union's failure to challenge the policy of not including weekend work for the purposes of seniority estopped it from complaining about such a practice.

AWARD: The grievance was allowed. In holding that the Grievor's claim was arbitrable, the Arbitrator stressed that the purpose of the probationary period was to provide time for assessment and evaluation. Such time, the Arbitrator noted, was served by the Grievor. The Employer's estoppel argument was rejected as the necessary forbearance by the Union was said to be lacking.

DISSENT: R. Simpson, Nominee for the Employer. Mr. Simpson stressed the distinctions throughout the agreement between overtime and "scheduled hours" and emphasized the long standing practice of refusing to include overtime in the calculation of seniority benefits.

FILE NO. AA89-08-003

EMPLOYER: Villacentres Management (1984) Ltd.

UNION: Oakview Tuxedo Nurses M.O.N.A., Local 8

BOARD: J.M. Chapman, Q.C., Chairperson
R. Simpson, Nominee for the Employer
D. Shrom, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
R. Deeley, for the Union

ISSUES: 1. The Scope of Arbitral Review 6:3100
2. Proof of Ability 6:3200
3. Ability and Qualifications: Criteria 6:3300
4. Sec. 80 of The Labour Relations Act

DECISION RENDERED: August 9, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a registered nurse, unsuccessfully applied for the position of Unit Co-ordinator. The position was awarded to an employee, who, while more senior than the Grievor, did not meet the job requirements of two years supervisory experience and a certificate in a nursing unit administration course or university equivalent. The Union filed a grievance claiming that, although the Grievor also did not fulfill all of the job's requirements, she was wrongfully denied the position. It argued that the Grievor had supervisory experience and was taking a management course at the time of the selection. As well, it offered that the interview and selection process were unfair as the criteria were not known beforehand, different candidates were interviewed by different persons and no proper records of the interviews were kept.

The Employer stressed that the Union could not state what provision of the collective agreement had been violated by the Employer. Further, it submitted that the successful candidate possessed more seniority than the Grievor and as per the collective agreement, seniority was to be the governing factor if all other criteria were equal.

AWARD: The grievance was allowed in part. The Board ruled that the Employer had violated the terms of the collective agreement because neither the Grievor nor the incumbent met the minimum qualifications for the job. Because there was no evidence to establish that the applicants were "equal" due to the procedural shortcomings, it found that it was impossible to determine which candidate was deserving of the job. As such, it ordered the matter be remitted back to the Employer for a new determination. In this second selection process, the Employer was required to specify all of the criteria employed by the selection committee. The Board also specified that no weight was to be given to any academic or work experience earned since the original job posting.

DISSENT: R. Simpson, Nominee for the Employer. Mr. Simpson stressed that the Union could not point out the violation of a specific provision of the collective agreement. He stated that the Union had not met the onus to prove that the Grievor was better qualified than the successful candidate.

FILE NO. AA89-08-004

EMPLOYER: Dauphin General Hospital

UNION: International Union of Operating Engineers, L. 827A

BOARD: J.M. Chapman, Q.C., Chairperson
R. Whiteway, Nominee for the Employer
C. Derham, Nominee for the Union

APPEARANCES: K. Lercher, for the Employer
R. Tonn, for the Union

ISSUES:
1. Intoxicants 7:3560
2. The Reasonableness of the Penalty 7:4300
3. Rehabilitative Potential 7:4422
4. Suspension Discharge 7:3542

DECISION RENDERED: August 17, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a Power Engineer, had been issued a written warning informing him that his continued employment depended on his compliance with an alcohol treatment program. On the day in question, the Grievor contacted management with a question regarding his paycheque, and that he was unable to work his scheduled shift that evening. His supervisor said that she would only discuss the matter in person. When the Grievor arrived, he was incoherent and belligerent. Noticing alcohol on his breath, the supervisor requested that he submit to a blood test which he refused. A decision was later made to terminate the Grievor. The Union filed a grievance claiming that the termination was without cause as the Grievor was not drunk on the day in question. The smell of alcohol on his breath was attributed to the fact that he had consumed several low alcohol beer that day. It submitted that the Grievor was under considerable financial stress at the time of the incident. Since that time, it said that he had made positive steps and was on his way to recovery. It emphasized that the Grievor had informed the Employer that he was not showing up for the shift and that he attended work only to deal with his paycheque complaint.

AWARD: The grievance was allowed in part. The Board stressed that previous arbitral decisions have treated alcoholism as an illness. As such, it said that termination due to alcohol related problems was justified only when such behavior makes a continued employment relationship impossible. It found that the Grievor's work was satisfactory and that his absenteeism was not excessive. Therefore, it ordered that the Grievor be reinstated subject to several restrictions. Any failure to comply with these conditions would result in the his immediate termination. As well, it ruled that the Grievor was not entitled to any compensation for the 11 month period following his termination.

DISSENT: C. Derham, Nominee for the Union. Mr. Derham found that the termination and the subsequent 11 month period of unemployment was too severe a penalty, because the Grievor did not show up to work intoxicated and had informed the Employer of his inability to work his shift.

R. Whiteway, Nominee for the Employer. Mr. Whiteway stressed that the Grievor had been notified that his employment was dependent on his abstaining from alcohol. He said that the Grievor's inability to work his shift was the result of his consumption of alcohol, and therefore, he had violated the terms of his employment and justified his termination.

FILE NO. AA89-08-005

EMPLOYER: Dominion Bridge
UNION: United Steelworkers of America, Local 4095
ARBITRATOR: A.R. McGregor, Q.C.
APPEARANCES: K. Lercher, for the Employer
A. Rivers, for the Union

ISSUES:
1. Trial & Training Periods 6:3230
2. Probationary Employees 7:5000
3. Management's Duty to Act Fairly 4:2320
4. Unsuitability 7:3530
5. Sec. 80 of **The Labour Relations Act**

DECISION RENDERED: August 29, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who had 13 years of seniority, was assigned the position of Structural Sawman-Tacker as a learner. Although he experienced some difficulties with certain aspects of the job, neither his instructor nor management complained to him about his performance. Two months later, the Grievor was informed that he was being removed from the position because of inadequate production. The Union filed a grievance alleging that the Employer failed to provide the Grievor with a regular opportunity to learn the job as he was not given proper instruction and work expectations were not communicated to him. It also contended that the Employer had failed in its duty to provide a fair and adequate period of training, contrary to the provisions of Section 80(2) of **The Labour Relations Act**. In addition, it argued that any problems with a trainee's performance must be made clear before training was discontinued. The Employer suggested that the 7 to 12 month training period provided for under the collective agreement was excessive given the basic nature of the job. It further argued that it had the discretion to shorten the training period. It also maintained that the Grievor was not co-ordinated enough to perform the work in question.

AWARD: The grievance was allowed. The Arbitrator found that the Employer's actions were contrary to Section 80 of **The Labour Relations Act**. Moreover, the Employer's failure to discuss the Grievor's performance with his instructor or to allow him to participate in the decision to remove the Grievor raised questions about the good faith of the Employer. However, the Arbitrator held that the Employer was not obligated to provide a 7 to 12 month training period. While the Employer was free to shorten the training time to suit the needs of the job, the Arbitrator held that the Employer must provide adequate instruction and feedback to trainees during their orientation period. He commented that the Grievor could not possibly meet standards of which he was not informed. As a result, he ordered the Grievor be given another training period, but of a fair length of time and with the necessary communication.

FILE NO. AA89-09-001

EMPLOYER: Boeing of Canada Ltd.
UNION: Canadian Auto Workers, Local 2169
ARBITRATOR: P.S. Teskey
APPEARANCES: R. Hansell, for the Employer
W. Sumerlus/R. Tonn, for the Union
ISSUES: 1. Leave Work Without Permission 7:3130
2. Suspensions 7:3542
3. Promotion, Demotion and Transfer 6:2100
4. Substitution of Penalty 2:1470
5. Mitigating Factors 7:4400
6. Section 121(3) of The Labour Relations Act
DECISION RENDERED: September 1, 1989
EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who had been employed for approximately three years, left work without permission and without notification 25 minutes before the end of his shift. He was then seen in a bar 15 minutes before the end of his shift by a supervisor. As a result, he was suspended for twenty working days, was transferred to another location without a demotion so that he would be more closely supervised, and was denied for promotion. The Employer's decision was based on its feeling that there was a breach of trust, the Grievor's failure to admit he had left more than 5 minutes early, and two previous letters of warning. The Union filed a grievance claiming the discipline imposed was excessive, unjust and unreasonable. It submitted that the incident had occurred on a day when the Grievor had worked hard and without breaks in the morning and had completed his work. As well, the Grievor had admitted wrongdoing and displayed an understanding of and remorse for the incident. Finally, the Union noted that the Grievor's record although not "spotless" should not be characterized as a very poor one.

AWARD: The grievance was allowed in part. The Arbitrator found that the Grievor never intended to hide the fact that he left work early and without permission. The Grievor's record, although not unblemished, was devoid of previous suspensions and the two warnings it contained were not based upon equivalent conduct to that in question. As well, the Grievor was characterized as a good worker. Therefore, the Arbitrator ruled that the twenty day suspension was excessive and reduced the suspension to ten days. The substituted penalty was sufficient to indicate to both the Grievor and other employees that this conduct was viewed seriously. As well, the original penalty represented a substantial portion of his annual income, was coupled with other disciplinary measures, and the detriment suffered by the Employer appeared to have been relatively minimal.

FILE NO. AA89-09-002

EMPLOYER: City of Winnipeg
UNION: Canadian Union of Public Employees, Local 500
ARBITRATOR: M.H. Freedman, Q.C.
APPEARANCES: M. Samphir/M.E. Cavett, for the Employer
R. Tonn, for the Union
ISSUES:
1. Exhaustion of Jurisdiction 2:4000
2. Prior Award 2:3220
3. Damages 2:1410
4. Promotion 6:2100
5. Section 121(4) of The Labour Relations Act

DECISION RENDERED: September 6, 1989 (Prior Award - April 19, 1988)
EXPEDITED ARBITRATION: No

CIRCUMSTANCES: In a previous award, the Arbitrator had found that the process used to judged the qualifications of the applicants for the position of Assessor IV Specialist was flawed. As a result of the award, the Employer devised a new test. The Grievor passed the test and was appointed to the position as of January 16, 1989. The Union then sought compensation for him asserting that he was entitled to be paid at the higher rate of the Assessor IV Specialist from either of the two dates which the incumbent had been appointed to the position in question. The Union sought a declaration or award regarding the compensation. The Employer argued that the Arbitrator did not have jurisdiction to issue an award in this matter because the award was final on all points and there was no expressed reservation of jurisdiction which would have been wrong in any case because no liability was found. The Union contended that the Arbitrator could not have reserved jurisdiction in the award, because it was not clear at the time whether the Employer was liable.

AWARD: The grievance was allowed in part. The Arbitrator stated that as per subsection 121(4) of The Labour Relations Act, the jurisdiction of an arbitrator or arbitration board with respect to a matter continued until every aspect of the matter had been determined notwithstanding that the arbitrator or board had not expressly retained jurisdiction in any interim or other decision in the matter. He found that the real substance of the grievance was whether the Grievor should have been awarded the position as per article 12 of the collective agreement which required the Employer to award the job to the senior qualified applicant. In the previous award, neither of the Grievors had satisfied the Arbitrator that they were qualified. He determined that jurisdiction was retained by virtue of the statutory provision clothing arbitrators with jurisdiction which prevailed over any wording in the award. He found that the more senior Grievor would have clearly been entitled to the position as of the later two dates submitted by the Union. Therefore, he ruled that the Grievor was entitled to compensation from that date.

FILE NO. AA89-09-003

EMPLOYER: University of Manitoba

UNION: University of Manitoba Faculty Association

ARBITRATOR: D.E. Bowman, Q.C.

APPEARANCES: W.L. Ritchie, Q.C., for the Employer
R. Tonn, for the Union

ISSUES:
1. Revision of Classification 5:2440
2. Procedural Requirements 5:2500
3. Management Rights 4:2310
4. Intention of the Parties 4:2100

DECISION RENDERED: September 6, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who held a term appointment as an Assistant Professor, made a request for a probationary appointment. The "Special Ad Hoc Committee" unanimously recommended that she be given the appointment. However, the Director of the School of Nursing did not accept the committee's recommendation because of the absence of evidence of scholarly work, and only a promise that this would be undertaken in the following year; and, the concern that the Grievor did not establish effective relationships with her colleagues. The Union filed a grievance alleging that the Grievor's application for a probationary appointment was dealt with by a committee which was not constituted or conducted according to the requirements of Article 18 of the collective agreement which established a code of procedure to be followed in seeking, evaluating, and engaging academic employees. The Employer contended that the situation was not encompassed within the provisions of Article 18, because this was not an initial hiring, since the Grievor was already employed under a term contract, nor was it a promotion since she sought a position which was identical to the term position she already held. In this case, it argued that it was at liberty to follow the less formal and structured procedure that it had, so long as it acted with fairness and impartiality.

AWARD: The grievance was allowed. The Arbitrator found that the better sense of interpretation of Article 18 must include all positions including the conversion from term to probationary. He stated that such a situation should not fall under Management Rights. He ruled that the provisions of the Article ought to have been followed in dealing with the Grievor's application and ordered that a proper committee under Article 18 be convened to hear and recommend upon her application for a probationary appointment.

FILE NO. AA89-09-004

EMPLOYER: City of Winnipeg

UNION: Canadian Union of Public Employees, Local 500

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: M. Samphir, for the Employer
R. Tonn, for the Union

ISSUES:
1. Absence on a Leave of Absence 8:3125
2. Multiple Benefits 8:3330
3. Discrimination 7:4414
4. Intention of the Parties 4:2100

DECISION RENDERED: September 19, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: Eighteen days after her maternity leave had commenced, the Grievor unexpectedly delivered her baby by caesarean section. Her recovery period was at least six weeks. She requested that she be entitled to take sick leave of six weeks which would allow her to extend her maternity leave by six weeks. The Employer declined her request. It did not dispute that the Grievor was ill, but she had chosen to take paid maternity leave and the collective agreement did not provide for the use of sick leave benefits while on maternity leave. It noted that the agreement did contain such a provision for sick leave while on vacation. The Union filed a grievance claiming that the agreement did not stipulate that the leave had to be a consecutive period. It argued that the nature of the absence from work may change and that there was no principle which prevented one type of leave from being interrupted and changed for another type of leave. The Union also submitted that the Employer had allowed another employee's request to interrupt his paid union leave with sick leave. Denying the Grievor's request amounted to sexual discrimination.

AWARD: The grievance was denied. The Arbitrator was satisfied that the period of maternity leave as contemplated by the article in question was for a consecutive period because of the most logical interpretation of the phrases used. He found support in this interpretation from the agreement signed by the Grievor which refered to the maternity leave period as being "the period from December 7, 1987 to April 22, 1988 inclusive." In addition, he found that if the parties had truly intended that maternity leave could be interrupted for sick leave purposes, they would have inserted a clause similar to that relating to interrupted vacation leave.

FILE NO. AA89-09-005

EMPLOYER: Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: R. Cram, for the Employer
R. Erb, for the Union

ISSUES:
1. Revision of Classification and Rates 5:2440
2. Non-disciplinary Demotion 7:3544
3. Collective Agreement Limitations 2:3100

DECISION RENDERED: September 22, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: As a result of a reassessment, the Grievors' jobs were down-graded one step from a Health and Social Development Specialist 6, and in one case a Psychologist 3, to a Health and Social Development Specialist 5. Grievances were filed claiming that the changes were demotions and that the reductions in salary were disciplinary in nature as well as an improper and unfair exercise of management rights. The Employer raised a preliminary objection to the Arbitrator's jurisdiction claiming that the issue concerned reclassification and was a matter to be dealt through a grievance procedure before the Civil Service Commission as per Article 45:03 of the collective agreement. The Union argued the clause was not applicable and characterized the matter as a non-disciplinary demotion and as per article 44:01 an arbitrator was empowered to decide the proper forum.

AWARD: The grievance was found to be inarbitrable. The Arbitrator heard no evidence to suggest that there was any improper motivation behind the reclassifications. Based on the evidence presented, he could not find that the Employer's action amounted to a demotion dressed up as reclassification. Therefore, in light of the collective agreement provisions, he was of the opinion that the Civil Service Commission appeal procedure was the proper one in the circumstances and that it would decide if the reclassification of the Grievors was properly done.

FILE NO. AA89-09-006

EMPLOYER: C.M.L. Northern Blower Inc.

UNION: United Steelworkers of America, Local 7360

BOARD: J.M. Chapman, Q.C., Chairperson
R. Simpson, Nominee for the Employer
C. Trigwell, Nominee for the Union

APPEARANCES: K. Lercher, for the Employer
R. Tonn/W.Sumerlus, for the Union

ISSUES:
1. Measurement of Probationary Period 7:5010
2. Standard of Review of Disciplinary Action 7:5020
3. Discharge 7:3542
4. Unsuitability 7:3530

DECISION RENDERED: September 26, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a probationary employee, had his employment terminated because a slight decline was observed in his work performance during the last few days of his employment, and the Employer believed he did not have future potential for promotion. As well, it suspected absenteeism problems in the future, because the Grievor was absent for two days at the beginning of a week. The Grievor was informed of the decision after he had punched out at the completion of his last probationary shift. The Union filed a grievance alleging that the Employer had violated article 10.03(a) of the collective agreement because the Grievor had been discharged after the completion of his probation for no reason and without just cause. The Union contended that Employer had not objected to or questioned the Grievor about his absence. In addition, the Employer's actions were arbitrary as no real assessment was made of his potential and no specific complaints were given regarding his performance. The Employer submitted that the Grievor, when terminated, was still on a probationary status and that he had been notified more than once prior to the conclusion of the shift to report to the personnel office. It stated that, based on "a collection of facts", the Grievor was not a suitable employee and his termination was not related specifically to a grievance over faulty work or absenteeism.

AWARD: The grievance was allowed. The Board found that it would be overly technical to hold that the Grievor had attained seniority rights ten minutes after completing his shift and concluded that he was a still a probationary employee. However, even with this status and the lower standard of proof which applied with respect to probationary employees, the Board ruled that the Employer did not establish that its decision was based on fact. The Board found that because the Grievor had provided a proper medical certificate for his absence, the Employer unfairly postulated the potential for future absenteeism problems. From the evidence presented, the Board did not find a decline in his work performance or that he was an unsuitable employee. Therefore, it ruled that the Grievor be reinstated with compensation and without any loss of seniority.

DISSENT: R.A. Simpson, Nominee for the Employer. Mr. Simpson agreed that the Grievor was a probationary employee, but could not agree that the Board should override the Employer's assessment as to the suitability of the Grievor for permanent employment status.

FILE NO. AA89-09-007

EMPLOYER: Westfair Foods Ltd.

UNION: Manitoba Food and Commercial Workers, Local 832

BOARD: M.H. Freedman, Q.C., Chairperson
D.H. Kells
M. MacIsaac

APPEARANCES: G. Mitchell/ R. Roy, for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Reduction of Hours 6:2210
2. Abandonment, Settlement and Withdrawal 2:3230
3. Preliminary Objection 3:2100
4. Strikes and Lock-outs 9:2100

DECISION RENDERED: September 28, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Union filed a policy grievance alleging that the Employer had violated the scheduling provisions of Article 19 of the collective agreement because the hours of work of certain workers, one of whom was the Grievor, were less than they had been receiving before the strike of 1987. The Employer raised a preliminary objection and asserted that the Arbitration Board was without jurisdiction to hear the matter because the substance of the two grievances was identical to the allegation and complaint that had been raised before the Manitoba Labour Board and was ultimately disposed of by agreement. The Union agreed that the complaints raised before the Labour Board were similar to those raised in the grievances, but asserted that there were recurring and continuing violations. It also contended that the policy grievance was filed after the withdrawal of the Labour Board matter, and that in any event it was not claiming damages for the period prior to the Labour Board proceedings being terminated.

AWARD: The grievances were found to be inarbitrable. From the evidence presented, the Board found that the parties had come to an agreement and the matter was withdrawn from the Labour Board. It found that the agreement, whatever its motivation, effectively brought an end to the right of either party to complain about practices during the course of the current collective agreement that were raised and resolved in the Labour Board process. Further, the Board found that the question of a continuing grievance was not applicable.

FILE NO. AA89-09-008

EMPLOYER: INCO Ltd.

UNION: United Steelworkers of America, Local 6166

ARBITRATOR: P.S. Teskey

APPEARANCES: M. Christiansen, for the Employer
D. Brown, for the Union

ISSUES: 1. Application of Seniority 6:2000
2. Extrinsic Evidence 3:4400
3. Work Hours and Shifts 5:3100

DECISION RENDERED: September 28, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who had been a T.Q. Mechanic since 1972, had bid into a posted day shift position which he had worked with the odd exception from that time until the summer of 1988 when the Employer decided to impose a rotational shift for all mechanics. The Union filed a grievance alleging that the Grievor was denied the right to work his bid shift and that his seniority was not being respected as long as more junior employees were available to work the afternoon and midnight shifts. The Union argued that the change to rotational shifts was unfair, unreasonable and was a marked departure from the general practice of some 25 years. It submitted that, when considered together in their entirety, the application of Article 15.07, which dealt with reasssignments, and Article 15.10, which dealt with vacancies, was unclear. In addition, it submitted that in the finalization of the latest collective agreement, clauses 15.10(a) and (b) should have been reflected in 15.07 but were not due to an oversight. Therefore, it suggested that the wording of the agreement for the previous twenty years had to be honoured. It also suggested that the change made by the Employer was without proper rationale or prior discussion with the Union. In addition, it indicated that since the Employer made exceptions for grandfathering, the holder of a day shift bid should retain the right to hold that bid.

The Employer contended that under the clear language of the agreement, it had the right to asssign any employee in any classification to any shift. It indicated that the right was clearly stated in Article 15.10 and that Article 7.05 provided an agreed upon method for changes to shift schedule. It further submitted that the evidence of past practice was inadmissible, not consensual, nor was it if such clarity to assist in the case.

AWARD: The grievance was denied. The Arbitrator found that the evidence as to past practice or to the negotiations was not clear or consistent and did not assist him with his decision. He found that Article 15.01 did not include a choice of shifts as a case where seniority prevailed. He also found that Clauses 15.10(a) and (b) referred to the employees in the "Mine Department" and did not include the Mechanical Department. As well, evidence disclosed that while positions were occasionally posted or bid upon, that practice did not appear to have been consistent or universal. Even Article 15.07 used the word "may" rather than "shall", making the provision permissive. As to the argument that an error was made in the present wording, the amendments to the wording were reviewed and signed by authorized Union officials. He could not find that the Grievor was treated unfairly. His bid for a day shift position was made in the distant past and was always subject to the overriding language of Article 15.10 which had been in existence since he first assumed his position.

FILE NO. AA89-10-001

EMPLOYER: Canadian Sportswear Co. Ltd.

UNION: Amalgamated Clothing and Textiles Workers, L. 459

ARBITRATOR: J.M. Chapman, Q.C.

APPEARANCES: S. Guertin, for the Employer
W. Sumerlus, for the Union

ISSUES:
1. Suspension & Discharge 7:3542
2. Intoxicants 7:3560
3. Insolent, Unco-operative Behaviour 7:3660
4. Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: October 5, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who had been employed as a Service Person for approximately 13 years, reported for work one Saturday morning for an overtime shift. He was hung over and admitted that he had been drinking the night before. Due to his condition, his work suffered. His supervisor told him to go home, but he refused and threatened her life. The senior supervisor then escorted him to the elevator. Instead of going home, he returned to the floor and attempted to apologize to his supervisor. As a result of the incident, his employment was terminated. A grievance was filed claiming unjust dismissal.

AWARD: The grievance was allowed in part. The Arbitrator was satisfied that the incident merited discipline, because no employee had the right to threaten anyone at the workplace, and he found that the supervisor was genuinely concerned over the threat. However, he could not find evidence to suggest that the Grievor had ever engaged in similar behaviour. In addition, he found that the Grievor did not fully appreciate that his actions jeopardized his job, because the Employer, in an over-abundance of kindness, continually gave him further chances. In consideration of his lengthy service, because he was a conscientious and good employee, and because he had felt remorse and did apologize, the Arbitrator ruled that the discharge be substituted with a three month suspension without pay. He was reinstated for a three year probationary period subject to certain conditions, breach of which would result in termination.

FILE NO. AA89-10-002

EMPLOYER: Motorcoach Industries Ltd.

UNION: International Association of Machinists and Aerospace Workers, Lodge 1953

ARBITRATOR: D. Baizley

APPEARANCES: J. Scurfield/J. Jeffrey, for the Employer
L. Paulson, for the Union

ISSUES:
1. Suspensions 7:3542
2. Attendance at Work 7:3100
3. Lateness 7:3140

DECISION RENDERED: October 6, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was issued a written warning for excessive absenteeism and tardiness. Four months later, he was suspended for two days because his attendance did not improve. The Union filed a grievance claiming that the suspension was unjust. It contended that the Grievor's absenteeism and tardiness record had shown improvement. As well, he had a legitimate basis for each absence and the final absence seemed to have been a triggering event for the suspension and should be ignored. As a result, the Grievor had been suspended for "a few lates " which did not justify such a severe penalty.

AWARD: The grievance was denied. The Arbitrator stated that even if the absences were disregarded, the Grievor was late on three occasions within a two-week period. He found that all the "lates" were culpable. Therefore, based upon the Grievor's poor record over his 11 years of employment and that the "lates" came within 3 months of the written warning, the Arbitrator ruled that the two-day suspension was justified.

FILE NO. AA89-10-003

EMPLOYER: Gilbert Plains Health Centre Inc.

UNION: Gilbert Plains Nurses MONA, Local 38

BOARD: W.D. Hamilton, Chairperson
R. Whiteway, Nominee for the Employer
C.Derham, Nominee for the Union

APPEARANCES: J. Scurfield/J. Jeffrey, for the Employer
R. Deeley, for the Union

ISSUES:
1. Duty of Fidelity 7:3330
2. Discharge 7:3542
3. Economic Hardship 7:4426
4. Use of Prior Record 7:4314
5. Procedural Requirements 7:2100

DECISION RENDERED: October 10, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a Licenced Practical Nurse, was discharged when the Employer discovered that she sent the Board of Trustees an anonymous "poison pen" letter, which contained slanderous and malicious statements against the Administrator. The Union filed a grievance alleging that the discharge was unjust. It argued that the termination was void, because the Grievor was not given advance notice of the nature of the complaint in accordance with Article 29.01 of the collective agreement. It also argued that the letter of dismissal referred to "letters" and the Employer only established that the Grievor was responsible for one.

AWARD: The grievance was denied. The Board could not find a reason why the Grievor could not have been advised that a discharge was contemplated, but the qualifying phrase in Article 29.01 was "where possible". In any event, it noted, from the evidence, that the Grievor was aware the meeting was for disciplinary reasons. As to the reference to "letters", the Board found that the use of the plural did not invalidate the discipline. The Board also found that her work history could be heard, because her actions of writing the letter and then offering her explanations for its existence, justified the examinations. The Board found that the contents of the letter did not meet the criteria developed in jurisprudence on "whistle-blowing". Many of the statements were either false or scurrilous and attacked the Administrator personally and without justification. Upon examination of the specific events cited, the Board found that they did not constitute justification for the letter. As well, it stated that a ruling on whether or not he was correct in each case was not necessary, because his decisions were either consistent with the agreement or should have been resolved through the grievance process. The Grievor did not even extend "token respect" to the Administrator's role as management. Even though the Grievor had a lengthy record of service and suffered economic hardship due to the lack of alternative employment, the discharge was justified due to the Grievor's intent to harm the Administrator, and because she did not apologize and did not retract the letter. The letter so severely damaged the employment relationship, that it was not redeemable. Therefore, it ruled that the dismissal was justified.

FILE NO. AA89-10-004

EMPLOYER: The Pas Health Complex

UNION: Service Employees' International Union, L. 308

BOARD: J.M. Chapman, Q.C., Chairperson
R. Cann, Nominee for the Employer
C. Neufeld, Nominee for the Union

APPEARANCES: W.S. Jones, for the Employer
G. Trew, for the Union

ISSUES: 1. Interest Arbitration 1:0000
2. Entitlement to Wages 8:1000

DECISION RENDERED: October 11, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The parties had negotiated an agreement in which they could not agree on the 1988 salary to be paid to the Pharmacy Aide. The matter was referred to the Board. Each party was to submit a "Final Offer" from which the Board was to choose one of the offers presented. This was not a Final Offer arbitration under the specific provisions of **The Labour Relations Act**.

AWARD: The Board compared the job descriptions and salaries of Aides from four other districts with that of the Aide in The Pas. In view of the extra mandatory educational qualifications specified in the job description and the apparent extra duties referred to in same, the Board was of the opinion that the offer of the Union should be accepted.

DISSENT: R.S. Cann, Nominee for the Employer. Mr. Cann was of the opinion that, because the Aide was already the highest paid in the province, the offer of the Employer adequately compensated the Aide for her educational qualifications and for the extra duties she performed. He noted that awarding the higher rate placed her salary at a scale higher than some pharmacy technicians in the province, which was similar to paying a Licenced Practical Nurse at a greater rate than a Registered Nurse.

FILE NO. AA89-10-005

EMPLOYER: Winpak Ltd.
UNION: Canadian Paperworkers Union, Local 87
ARBITRATOR: C.B. Cramer, Q.C.
APPEARANCES: G. Parkinson, for the Employer
L. Cherniack/D.Shrom, for the Union
ISSUES: 1. Computation of Vacation and Vacation Pay 8:3230
2. Estoppel 2:2200
3. Intention of the Parties 4:2100
DECISION RENDERED: October 13, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: As per article 16.02(c) of the collective agreement, the Grievor, who had been an Operator 1 for over 8 years, was to be paid vacation wages "equal to six percent of gross earnings during the preceding vacation year." The Grievor's vacation pay was calculated and paid on the basis of the Employer's interpretation of "gross earnings" as excluding vacation pay paid in the previous year, but including base rate, shift premiums, general holidays and overtime. It argued that the list of inclusions was exhaustive. The Union disagreed with the Employer's interpretation and argued that the term "gross earnings" included all of the earnings of the employee including vacation pay and the list represented examples only.

The Employer argued that the Union was estopped from advancing the matter, because during negotiations, it was silent and posed no questions with regards to the phraseology of the article.

AWARD: The grievance was allowed. The Arbitrator found that evidence did not exist to support the Employer's contention that the Union, by acquiescence, had accepted the Employer's interpretation of the article. As well, she found that the article was not clear and unambiguous. Therefore, she ruled that the Union was not estopped from pursuing the grievance. As to the interpretation of the word "including", the Arbitrator ruled that the meaning was only exemplary and not definitive. She found that there was no evidence of discussions during negotiations nor from past practice to assist with the definition of "gross earnings". Therefore, based on the ordinary meaning of the term, she ruled that vacation pay should be included in gross earnings, and therefore in the calculation of vacation pay for the next year.

FILE NO. AA89-10-006

EMPLOYER: City of Winnipeg

UNION: Amalgamated Transit Union, Local 155

BOARD: D. Baizley, Chairperson
G.D. Parkinson, Nominee for the Employer
G. Rodgers, Nominee for the Union

APPEARANCES: M. Samphir, for the Employer
M. Myers, for the Union

ISSUES:
1. Illness: Benefits and Other Rights 8:3300
2. Severance Pay 8:3800
3. Intention of the Parties 4:2100
4. Estoppel 2:2200

DECISION RENDERED: October 17, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The parties differed in their interpretation of Article 8 of the collective agreement which dealt with Sickness and Accident Severance Plan. The plan provided the employees with a benefit that was commonly referred to as the "sick leave cash-out". The Union contended that the sick leave credits were to be reconciled annually, and that Articles 8.2 and 8.3 were to be read conjunctively. The Employer contended that Article 8.3 required the last five years of service were to be looked at in a block, and the calculation of the value of sick leave cash-out was an exercise quite separate from the annual reconciliation done pursuant to Article 8.2. The Employer submitted that the language of the agreement was unclear and ambiguous and that its method for calculating the cash-out was correct because it was the same as utilized for its agreements with other unions. It also argued that the Union was estopped from advancing the grievance, because it had not complained of the calculation during the first three years the plan was in effect.

AWARD: The grievance was allowed. The Board found that to properly interpret Article 8.3, the article must be read as a whole, and therefore the subsections operate in conjunction with each other. When this was done, the result was that the interpretation advanced by the Union must prevail. As to the issue of estoppel, the Board was satisfied that a legitimate misunderstanding existed between the parties. The Board ordered the Employer to cease and desist paying employees according to its interpretation of the agreement.

FILE NO. AA89-10-007

EMPLOYER: Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: F.M. Steel

APPEARANCES: R.D. Cram, for the Employer
S. Hamon, for the Union

ISSUES:
1. Refusal to Follow Instructions 7:3610
2. Suspension 7:3542
3. Unauthorized Absence 7:3114
4. The Reasonableness of the Penalty 7:4300

DECISION RENDERED: October 23, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, a home care attendant, was absent from work on a Monday even though her request for time off had been refused and she had been instructed to report to work. As a result of her failure to report, the Employer suspended her without pay for 5 working days. The Union filed a grievance alleging the suspension was without just cause. The Grievor submitted that because no clients were assigned to her on the Friday and that her Monday afternoon client cancelled, that as a reasonable and understanding employee, if she could accept a full day and a half off without pay and without any argument, it was her expectation that the Employer would be more and equally understanding if she asked to be relieved of her Monday morning assignment to make better use of her free time.

AWARD: The grievance was allowed in part. The Arbitrator found that the Grievor had disobeyed a direct and clear order of the Employer. From the evidence, the Grievor was fully aware that notice for time off should be requested in advance and that no replacements were available to work her shift. In addition, the Arbitrator found that the Employer's denial of the request was reasonable as no replacements were available and because the Grievor did not indicate that there was an emergency or special need for the time off, only that she wished to make better use of her time. However, in view of the Grievor's good work record and relatively long service, and that the parties were still adjusting to a new collective agreement, the Arbitrator ruled that the five-day suspension was too harsh and ordered it amended to a two-day suspension.

FILE NO. AA89-10-008

EMPLOYER: Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: R. Cram, for the Employer
G. Ogonowski, for the Union

ISSUES:
1. Discharge 7:3542
2. Untrustworthiness 7:3330
3. Rehabilitative Potential 7:4422
4. Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: October 23, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a branch manager of a provincial housing program, purchased a jet pump. The purchase order was written out for a sump pump and was charged to the "Kelwood" project. When questioned about the purchase, the Grievor initially claimed that the pump had been installed at "Glenella", but when it was discovered in a storage shed, he admitted that he had borrowed the pump without permission for use at his own cottage. The Employer discharged the Grievor, because it alleged he had misused his position by purchasing the pump principally for his own needs. The Union filed a grievance alleging that the discharge was unjust. The Grievor claimed that he purchased the pump as a future replacement based on the advice given two months earlier by the former maintenance supervisor. The Union conceded that the personal use of the pump without permission was a mistake, but it argued that what occurred was a momentary aberration and lapse of good judgement.

AWARD: The grievance was allowed in part. The Arbitrator could not find that the Grievor had intended to steal the pump, but had purchased it for use at the housing project. However, he did find that the timing of the purchase was accelerated to meet the Grievor's own needs rather than those of the Employer. The Arbitrator suspected, but did not find, that the errors on the purchase order were made intentionally to camouflage what was happening. However, he was not prepared to find whether the Grievor deliberately concealed the facts or if he simply was unable to remember. He stated that the timing of the purchase and the unauthorized use of the pump amounted to a betrayal of trust, but did not meet the standards of theft. However, because the Grievor was in a position of trust and responsibility with authority over significant government property and funds, discipline was warranted. In consideration of the Grievor's good record and rehabilitative potential, the Arbitrator ruled that the discharge should be substituted for a suspension effective until the date of the award, which amounted to a 14-month suspension.

FILE NO. AA89-10-009

EMPLOYER: A.E. McKenzie Company Limited

UNION: Manitoba Food & Commercial Workers Union, Local 832

ARBITRATOR: G.C. MacLean, Q.C.

APPEARANCES: D. Proctor, for the Employer
R.D. Ziegler, for the Union

ISSUES: 1. Rights of Recall 6:2354
2. Bumping 6:2330
3. Intention of the Parties 4:2100

DECISION RENDERED: October 24, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a seasonal employee on lay-off, grieved that she was denied her rights to bump a less senior employee who was recalled to work in the classification of Relief Janitor. The Union filed a grievance alleging violation of articles 15 and 21 of the collective agreement. The Employer argued that the collective agreement only provided bumping rights at the time of lay-off. Conversely, the Union interpreted article 21 to mean that, at the time of recall, any senior employee is entitled to claim and bump into a job done by a less senior employee, regardless of the classification, so long as the senior employee had the ability to do the job.

AWARD: The grievance was denied. The Arbitrator found that the agreement clearly allowed for bumping between classifications in the event of a lay-off, but was ambiguous as to bumping at the time of recall. He interpreted article 21 to allow the Employer to recall employees according to classification and the seniority of the employee. He also stated that even if he accepted the Union's contention that the agreement provided for bumping at the time of recall, no evidence was adduced to establish that the Grievor was the most senior employee allegedly entitled to claim the job. Rather, the evidence indicated that when the Grievor became aware of the recall, she contacted the Union to claim the position. There was no indication that any employees who may have been senior to the Grievor had been contacted and given the opportunity to express an interest in the position.

FILE NO. AA89-10-010

EMPLOYER: Manitoba Rolling Mills Co.

UNION: United Steelworkers Union of America, Local 5442

ARBITRATOR: P.W. Schulman, Q.C.

APPEARANCES: J.M. Christiansen/A. Wortzman, for the Employer
M. Myers, Q.C./M.K. MacDonald, for the Union

ISSUES:
1. Discharge 7:3542
2. Dishonesty 7:3300
3. Qualifying for Disability Benefit 8:3320
4. Business and Medical Records 3:4320
5. Statutory Authority 3:4100
6. Section 120(1)(d) of The Labour Relations Act

DECISION RENDERED: October 27, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor had injured his back while at work. As a result of the injury, he was on Worker's Compensation for 29 months. While off work he was observed, and sometimes videotaped, performing activities which would be physically painful if not impossible for a person in his condition. When the Plant Safety Officer asked the Grievor of his current status, the Grievor stated that he could not come into the plant, and that he was in constant pain and could not drive. During a meeting to discuss his condition, he still denied that he was capable of working even when confronted with the videotape. Subsequently, he was discharged for misrepresentation of his physical condition. The Union filed a grievance claiming that the discharge was unjust. It also objected to the manner in which the Employer conducted the meeting. In addition, the Union objected to the introduction of a medical report, because the Employer had not given notice as required under section 50 of The Evidence Act. The Employer acknowledged that no notice was given, but expressed that it thought the Worker's Compensation Board had provided the Union with a copy when it had sent other documents to the parties. Consequently, because of an honest misunderstanding the report was not provided to the Union.

AWARD: The grievance was dismissed. The Arbitrator found that the Grievor had been so guarded in his revelation of the extent of his activities to all parties concerned, that he appeared to have intentionally mislead them of his physical condition. The Arbitrator also found that the procedure which was used by the Employer was acceptable especially since the collective agreement did not contain any provisions to be follow in such circumstances. The Arbitrator noted that the Grievor was under a positive duty to provide the information which was requested. Therefore, he ruled that discipline was warranted. Because in this case, general deterrence was an important factor in the assessment of the penalty, he upheld the discharge.

The Arbitrator ruled that the report was admissible. He noted that section 120(1)(d) of The Labour Relations Act gave the discretion to admit evidence, even though it might not be admissible in a Court proceeding.

FILE NO. AA89-11-001

EMPLOYER: City of Winnipeg

UNION: Canadian Union of Public Employees, Local 500

BOARD: D. Baizley, Chairperson
G.D. Parkinson, Nominee for the Employer
C. Trigwell, Nominee for the Union

APPEARANCES: D.W. Buhr, for the Employer
R. Tonn, for the Union

ISSUES: 1. Disciplinary Records 6:3310
2. Promotions 6:4100
3. Management's Duty to Act Fairly 4:2320
4. Section 80(2) of The Labour Relations Act

DECISION RENDERED: November 1, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor filed a grievance when he was not selected for either of two vacancies for the position of Aqueduct Foreman II. During a meeting to discuss the grievance, the Employer presented memos from the Grievor's personnel file which he was unaware existed. The memos were more critical, more detailed and made reference to specific incidents which were not raised in the documentation previously shown to him. As well, some comments which were to be expunged from a Performance Rating Report, as per a previous grievance, had remained on the file. The Union filed an individual grievance contending that the Grievor was unjustly dealt with and a policy grievance requesting that the Employer cease and desist from maintaining a "secret parallel file". The Employer contended that the documents in question were "memory aides" and were not being used for disciplinary purposes. Therefore, it argued that the issue did not fall under Article 14 of the collective agreement which gave employees the right to view and respond to documents in their departmental files.

AWARD: The grievance was allowed. The Board was unable to conclude that each and every notation made by a supervisor should be contained in a file to which the employee had access. However, any notes made during an assessment period should either be incorporated into the documents being shown to the employee or they should be destroyed. Specific to the grievance, the Board found that the private notes contradicted the performance rating and were used to determine eligibility for promotion. Therefore, it ruled that the Employer had breached article 15-3 of the agreement which required an unsatisfactory comment to be discussed with an employee. As a consequence, it suggested that the parties jointly review the documentation and decide which should be discarded. With respect to the policy grievance, the Board was not prepared to grant a blanket declaration as other legitimate competing interests had to be examined.

DISSENT: G.D. Parkinson, Nominee for the Employer. Mr. Parkinson did not concur in full with the Majority Award. He stated that the ruling was clearly academic because, as the author of the documents in question was deceased, the notes could not be contradicted or supplemented.

FILE NO. AA89-11-002

EMPLOYER: Winnipeg Leather (1981) Ltd.
UNION: International Ladies Garment Workers, Local 286
ARBITRATOR: J.M. Chapman, Q.C.
APPEARANCES: G.D. Parkinson, for the Employer
R. Tonn, for the Union
ISSUES: 1. Interest Arbitration 1:0000
2. Seniority: Aquisition and Termination 6:1000
3. Application of Seniority 6:2000
4. Credited Service for Vacations 8:3220
DECISION RENDERED: November 2, 1989
EXPEDITED ARBITRATION: No

CIRCUMSTANCES: As per Article 10.01 of the collective agreement, the definition of seniority was to be decided upon by an arbitrator. The Union advised that the definition of seniority would affect the provisions that dealt with lay-offs and recalls, and with determination of vacation entitlement. It also noted the reference in the corporate name of the Employer to "(1981)". It advised that prior to 1981, the leather manufacturing was carried out by the two companies which later formed the Employer's corporation. It submitted that prior service in either predecessor company ought to be counted for seniority purposes. The Employer advised that whether or not the Employer was a successor to the previous companies was not relevant as no "successor" benefits had been claimed at that time. It further noted that the acquisition of seniority should not be "automatically" determined as submitted by the Union, because the corporation was a "new" business.

AWARD: The grievance was allowed in part. Of considerable significance to the Arbitrator was the fact that the Employer commenced its operations in 1981 and the Union was not certified as the bargaining agent until 1987. As per the collective agreement, the Employer was the corporate entity identified as Winnipeg Leather. There was no evidence to show that the Employer was the same as either, or both of the predecessor employers. Under ordinary circumstances, the Arbitrator would conclude that any employment with either predecessor was of no significance. However, the parties would then be faced with the undisputed fact that approximately 22 current employees would have the same seniority date. He noted that the provisions of an agreement should provide a solution when a number of employees had the same seniority. He was of the view that for the purpose of lay-off and recall, those employees who were employed by the Employer when it commenced operation in 1981 and who were still employed, should utilize the date of first hire by either predecessor. He emphasized that the provisions of the seniority clause with respect to prior services were not deemed to apply to vacation entitlement. In defining vacation entitlement the parties had agreed to the phrase "continuous employment with the manufacturer" which in the Arbitrator's opinion was the Employer.

FILE NO. AA89-11-003

EMPLOYER: Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: P.S. Teskey

APPEARANCES: R.D. Cram, for the Employer
B. Haverlock, for the Union

ISSUES:
1. Failure to Co-operate 7:3580
2. Fighting, Assault 7:3430
3. Reasonableness of the Penalty 7:4300
4. Conflict of Interest 7:3330
5. Suspension 7:3542

DECISION RENDERED: November 2, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was a Juvenile Counsellor, received a complaint from a female resident who alleged that she was sexually harassed by the Centre's male nurse. The Grievor failed to report the complaint in accordance with departmental and institutional policy. Instead, he filed a complaint with the R.C.M.P. two weeks later. As a result of his actions, the Grievor was suspended for three days for failure to follow policy; failure to co-operate with the investigation conducted by the Employer; and, breach of confidentiality. In addition, he was reassigned from the night shift to the day/evening shift rotation for six weeks. The Union filed a grievance alleging that the Grievor was unjustly suspended, and even if discipline was warranted, a warning would have sufficed. It claimed the Grievor did not follow policy as he was concerned the incident might be "covered up", because he thought the Employer was "protecting" the male nurse. As well, he refused to discuss the complaint with the Employer's investigator, because he was uncertain of the repercussions. It also submitted that the Grievor had not breached confidentiality, because the police were part of the network of appropriate individuals to deal with in this situation.

AWARD: The grievance was allowed in part. The Arbitrator accepted that the Grievor had suspicions and a lack of faith with the Employer, but he felt that those perceptions were not reasonable upon an objective basis, nor did they provide a sufficient basis for exoneration of the Grievor's conduct. He found that, although the Employer was not blameless, the Grievor's conduct was worthy of discipline. Therefore, he ruled that the Grievor did fail to follow institutional policy, failed to co-operate with the investigation, and failed to provide a reasonable explanation of his actions. He would not rule that the Grievor breached confidentiality in a technical sense, because the R.C.M.P. were not in an equivalent position to the general public, and because the police were part of the network of appropriate individuals to deal with the situation. However, he found that the Grievor's actions were inappropriate since he was aware that the Employer was in the process of conducting an investigation. He found that discipline was warranted, but within the context of progressive discipline, he found that a three-day suspension was too harsh and ruled that it be reduced to one day.

FILE NO. AA89-11-004

EMPLOYER: Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: P.S. Teskey

APPEARANCES: B. Cram, for the Employer
B. Havelock, for the Union

ISSUES:
1. Discharge 7:3542
2. Mitigating Factors 7:4400
3. The Doctrine of the Culminating Incident 7:4310
4. Insufficient and/or Careless Work 7:3520

DECISION RENDERED: November 7, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who was a Juvenile Counsellor, had been given money by two of the residents with the agreement that she would buy clothes for them. On several occasions, the Employer had approached the Grievor as to why she had neither given the residents their clothes nor their money. She explained that she had overlooked returning the money to the residents because she was under stress from personal problems. She finally repaid the money several weeks later. Ten days later, the Grievor received notice which stated that a review of her employment record indicated instances of sleeping on duty, continual tardiness, and the borrowing of residents' clothing and money which was contrary to policy. It further stated that that type of conduct would not be tolerated and that she was dismissed. The Union filed a grievance claiming that the Grievor had been unjustly discharged.

AWARD: The grievance was denied. The Arbitrator was satisfied that the initial stages of the policy which required that exchanges of money must be entered into the Shift Log, was adequately carried through by the Grievor, but he questioned the appropriateness of her conduct in failing to return the money in a timely fashion. Her conduct indicated at least a careless, rather than an intentional disregard for her responsibilities. He was not satisfied that such an oversight was unlikely to happen again. He found that the delay of the return of money to the residents was worthy of discipline, and found it to be a culminating incident. The Arbitrator acknowledged that the Grievor had personal problems and that she could have difficulty finding another position relating to social work as most positions were somehow connected to the Employer. Despite the existence of the mitigating factors, when consideration was made of the previous record, especially that she had previously been suspended for failing to return money to a resident in a timely fashion, the Arbitrator ruled that the discharge was justified.

FILE NO. AA89-11-005

EMPLOYER:	Motor Coach Industries Ltd.
UNION:	International Association of Machinists and Aerospace Workers, Lodge 1953
ARBITRATOR:	J.M. Chapman, Q.C.
APPEARANCES:	J. Scurfield, for the Employer L. Paulson, for the Union
ISSUES:	1. Discharge 7:3542 2. Refusal to Follow Instructions 7:3610 3. Scope of Review 7:4100 4. Leave of Absence 7:3120
DECISION RENDERED:	November 8, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor requested, on short notice, a leave of absence for two shifts as she planned to volunteer at the Folk Festival. However, the Employer did not view her reason as being sufficient to grant a leave and denied her request. On the day she had originally asked for the leave to commence, she did not come in to work and she did not notify the Employer of her absence as per plant rules. She was absent for the next four work days, the last being for Union activities. At a meeting to find out what happened or to let her explain, the Employer found her attitude to be confrontational and defiant. She explained that she was absent for the other two days, because she had been entertaining guests from out of town and was exhausted. Based on her deliberate act of insubordination and desertion of the workplace, and that she made her act of insubordination known to other employees, her employment was terminated. The Union filed a grievance claiming that the penalty imposed was too harsh. It emphasized that there was no consistent approach by management in its treatment of requests for leaves of absence. In addition, it argued that the Grievor's absence did not impede production.

AWARD: The grievance was denied. While the Arbitrator was of the view that the Grievor's actions were not a technical breach of any rule, he found that her actions were cavalier, were not spontaneous and demonstrated a complete disregard for plant rules and her obligations to the Employer. He was not satisfied that the actions of the Employer were capricious or frivolous in denying the request. Evidence showed that the production department was busy and that the Grievor's services were required, and her absence created a detrimental short term effect. He also found that the Grievor was not discriminated against, because the individuals who had been granted leaves played a lead role in the activities in which they were involved. In consideration of the Grievor's record, the Arbitrator did not think it necessary to go beyond the 12 months prior to the incident. Within that time frame, she had received a warning and a suspension for insubordination. Because this incident was not isolated and coupled with the previous record, the Arbitrator was not prepared to conclude that the penalty imposed was too harsh. He also emphasized that the incident at issue had nothing to do with her Union activities.

FILE NO. AA89-11-006

EMPLOYER: Communities Economic Development Fund
UNION: Manitoba Government Employees' Association
ARBITRATOR: G.C. MacLean, Q.C.
APPEARANCES: B. Sokalski/J. Baigrie, for the Employer
B. Havelock, for the Union
ISSUES: 1. Intent of the Parties 4:2100
2. Company Rules 4:1500
3. Management Rights 4:2310
DECISION RENDERED: November 9, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Employer informed the Union that it wished to initiate the use of time sheets for staff to complete so that it could determine which accounts were incurring the most time. The Union filed a policy grievance in which it claimed that the requirement was contrary to Article 36.01, the past practice provision, which stated that "presently existing personnel policies, benefits, and working conditions shall be continued to the extent that they are more beneficial than and not in conflict with terms of the Agreement, unless modified by mutual agreement" of the parties. The Union characterized the requirement to complete time sheets as a working condition. It also voiced its concerns that the information provided would be used in a manner to coerce the employees.

The Employer raised a preliminary objection that Article 36.01 did not apply, and therefore, the grievance had no basis. It argued that the words "more beneficial than and not in conflict with terms of this Agreement" were nonsensical in that it was not possible for a pre-existing personnel policy, benefit, or working condition to be both "more beneficial" and "not in conflict with" the terms of the collective agreement, as "more beneficial" implied a degree of conflict. In addition, it contended that, as time sheets were not mentioned in the agreement, no conflict existed, and the state of "no time sheets" was not more beneficial than the terms of the agreement. It also disagreed with the Union that the completion of the time sheets was a working condition.

AWARD: The grievance was denied. The Arbitrator noted that while personnel policies, benefits, or working conditions may sometimes be dealt with in the collective agreement, they were also dealt with in other ways such as employer rules and custom. He found it reasonable to conclude that specific provisions of the collective agreement would override pre-existing conditions and only those conditions not in conflict with the agreement would continue in effect. He found that giving effect to the words "more beneficial than" would produce absurd results because all existing conditions not specified in the agreement would be eliminated. He stated that he could not give much weight to speculation of improper motives. In any event, he ruled that the request for time sheets was reasonable and similar to a request for information or a report.

FILE NO. AA89-11-007

EMPLOYER: Winnipeg Free Press

UNION: Graphic Communications International Union, Local 900M

BOARD: J.M Chapman, Q.C., Chairperson
R. Simpson, Nominee for the Employer
T. Turcan, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
R. Tonn, for the Union

ISSUES:
1. Premium Rates and Bonuses 8:2000
2. Work Hours and Shifts 5:3100
3. Intention of the Parties 4:2100

DECISION RENDERED: November 9, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: Individuals in the pressroom were paid one of four different rates: day, evening, lobster and midnight, presented in order from the lowest to the highest rate of pay. (A lobster shift is journalism slang for a shift that covers late evening and early morning hours during which staff remain on duty after regular editions of a newspaper have gone to press to await any new developments that may warrant an extra issue.) The shift in question commenced at 2:30 a.m. and continued to 10:30 a.m., and paid 7 hours at the evening rate, and included a 1 hour unpaid lunch break beginning at 6:15 a.m. The Union filed a policy grievance claiming that the majority of hours in the shift were night hours, but the employees were not being paid for the entire shift at the "lobster scale" of wages. The Union alleged that the Employer violated Article 7.03 of the collective agreement which provided that if the majority of the hours of a shift were night hours, the entire shift would be paid at the lobster rate and would consist of 7 1/2 consecutive hours exclusive of the lunch break. If the majority of the hours were day shift hours, the shift would consist of 7 consecutive hours exclusive of the lunch break and would be paid at the evening rate.

AWARD: The grievance was denied. The Board had to determine what was meant by night hours and day hours, which were not defined in the Article. It did specify that the lobster shift only applied to shifts that started between 3:00 p.m. and 2:29 a.m. The Board was satisfied that there were two conditions precedent to any shift attracting the lobster rate. The first was that the majority of hours must be night hours, i.e. worked from 6:30 p.m. to 6:30 a.m. The second was that the shift must start after 3:00 p.m. and before 2:30 a.m. The shift in question had a majority of hours as night hours because 3.75 hours of night hours were worked before the lunch period, and 3.25 hours of day hours were worked after the lunch period. While the shift in question consisted of a majority of night hours, it did not commence within the designated qualifying time period. Accordingly, it did not attract the lobster rate.

DISSENT: T. Turcan, Nominee for the Union. Mr. Turcan agreed with the Union submission that if either of the two conditions set out in the collective agreement were satisfied, the lobster rate should be paid.

FILE NO. AA89-11-008

EMPLOYER: INCO Ltd.
UNION: United Steelworkers of America, Local 6166
ARBITRATOR: J. Atwell
APPEARANCES: Not stated
ISSUES: 1. Criteria: Equal Work or Equal Skill 5:2420
2. Changes in Job Function 5:2410
DECISION RENDERED: November 21, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Employer revised the job description for the VBM Driller to add the operation of a scooptram. The parties were unable to agree on the code level, B or C, to attribute to Factor 4, (Manual Skill), and as a result, were unable to agree on the job classification. The basic difference between the job requirements of Factor 4 code levels B and C was that level C jobs were those "involving a high degree of co-ordination." The Union submitted that the position should be given the higher level code of C which would result in a higher classification. It argued that the job should have been compared with jobs using the same equipment (scooptram), and having the work done underground, and that the manual skill called for in using the scooptram which involved a high degree of co-ordination was the skill required to maneuver the vehicle underground. The Employer contended that the addition of the scooptram did not merit any increase in the job classification. From its perspective, the manual skill called for in using the scooptram which involved a high degree of co-ordination was the skill required in using the scooptram in the process of "mucking". It argued that the VBM Driller only used the scooptram to transport equipment and materials between locations. This type of usage was different from and not comparable to the use of the scooptram for loading and removing "muck" as did the positions which the Union forwarded for comparison.

AWARD: The grievance was denied. The Arbitrator found that the primary function of the scooptram was for the process of "mucking". The moving of equipment from one location to another was a secondary use. After reviewing the job descriptions of other positions at level B and C, the Arbitrator found that the Union had not established its claims that driving the scooptram underground rather than loading muck was the job function which merited a level code rating of C, and that it was the equipment relating to the job, and not the manner in which that equipment was used which determined the level code rating.

FILE NO. AA89-11-009

EMPLOYER: INCO Ltd.
UNION: United Steelworkers of America, Local 6166
ARBITRATOR: L. Cherniack
APPEARANCES: M. Christiansen, for the Employer
D. Brown, for the Union
ISSUES: 1. Allocation of Overtime Within the Group 5:3224
2. Defining the Bargaining Unit 5:1100
3. Intention of the Parties 4:2100
4. The Scope of Arbitral Review 6:3100
DECISION RENDERED: November 23, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: Overtime work was required to replace the brackets along the length of an I-Beam. The foreman decided the work was mechanical and that a mechanic was more skilled at using the required tools and could do the job quicker than an electrician. Therefore, he gave the work to the mechanic who had the least amount of accumulated overtime. The Union filed a grievance alleging that the Employer violated Article 7.03 of the collective agreement which required overtime work to be distributed as evenly as possible among the "working group". It submitted that "working group" in this particular case referred to each trade within a particular crew. Therefore, it claimed that the Employer should have distributed the required overtime to the Grievor, or at least to an electrician working under the same foreman. The Employer contended that the "working group" referred to a crew working for a particular supervisor, and in the instant case, that would mean a group composed of one welder, 11 electricians and 11 mechanics.

AWARD: The grievance was denied. After considering a previous award, a similar clause in a previous collective agreement, and the Employer's guidelines to supervisors for assigning overtime, the Arbitrator found that the phrase "working group" was a flexible one that must be interpreted according to the particular circumstances surrounding the required overtime. He also found that the parties deliberately eliminated the concept of classification within the definition of a working group. In this case, the Arbitrator found that the work performed was planned and was not an emergency. He was satisfied that the foreman acted in good faith when he assigned the work. However, the Employer had agreed to a clause that required an arbitrator to go beyond normal arbitral review of management discretion and decide whether the foreman's actions were right or wrong. While the Arbitrator did not doubt that the mechanic who did the work could perform the job safely and properly, he ruled that the essence of the work, taking into account the materials used and the purpose of the work, was more electrical than mechanical. However, he was not satisfied that the Grievor was the individual who should have received the overtime work as no evidence was presented to show that he was the electrician with the least accumulated overtime or that he was the only one with the necessary qualifications to do the work. Therefore, he declined awarding the Grievor compensation.

FILE NO. AA89-11-010

EMPLOYER: Manitoba Pool Elevators

UNION: The Grain Services Union

BOARD: J.M. Chapman, Q.C., Chairperson
R. Simpson, Nominee for the Employer
F.H. Cuddington, Nominee for the Union

APPEARANCES: K. Lercher, for the Employer
H. Wagner/B. Pearson, for the Union

ISSUES: 1. Promotion 6:2100
2. Senior Employee with the Required Ability 6:3210

DECISION RENDERED: November 23, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was the elevator manager at a grade 2 station, applied for, but was denied the position of elevator manager at a grade 6 station which was awarded to an employee with three months less seniority than the Grievor. The Employer informed him that he was not promoted because he continually experienced grade losses and net losses in some grains, and because customers complained of his method of operations and the dirty condition of his facility. Further, in his most recent "Annual Performance Review", his performance was below standard in some areas. The Union filed a grievance alleging that the Employer violated Article 4 of the collective agreement because the Grievor was entitled to the position due to his seniority and because he had the required ability and qualifications for the job. As well, it argued that although the Grievor had not grieved his latest performance appraisal, it was not fair because a new method of grading was used and it was not reviewed with the Grievor until after he applied for the position. The Employer stressed that stations graded two and six were different as indicated by the difference in the base salary. The management of the stations also required different degrees of ability and qualifications, and the Grievor had not met those requirements.

AWARD: The grievance was allowed. The Board found that Article 7.02 was a simple threshold clause. It also could not conclude that the Grievor did not have the ability and qualifications to continue on in a classification which he already held, because having performed the job for five years without any discipline, he must be deemed to have established his ability and qualifications. Most significantly, the duties and responsibilities in a grade 2 station were fundamentally the same as in a grade 6 station, although the volume was larger in the latter, the staff component was also larger. As to the detrimental comments in his most recent assessment, the Board commented that it also included a number of positive comments. Therefore, the Board ruled that the Employer, although not acting in bad faith, had failed to correctly apply the terms of the collective agreement and ordered that the Grievor should have been awarded the position.

DISSENT: R.Simpson, Nominee for the Employer. Mr. Simpson stated that although the titles were the same, the parties recognized a substantial distinction between an elevator manager grade 2 and grade 6 as evident from the differential in base salary. Promoting the Grievor to a higher volume station would have compounded the difficulties he was already experiencing.

FILE NO. AA89-11-011

EMPLOYER: Empress Foods Limited
UNION: Manitoba Food & Commercial Workers, Local 832
ARBITRATOR: J.M. Chapman, Q.C.
APPEARANCES: M. Christiansen, for the Employer
R. Ziegler, for the Union
ISSUES: 1. Insufficient and/or Careless Work 7:3520
2. Suspension 7:3542
3. Alteration of Grounds 7:2200
4. Reasonableness of the Penalty 7:4300
DECISION RENDERED: November 29, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Shift Supervisor claimed to have seen the Grievor, who was working as a Rackman, grab onto a conduit pipe which encased a high voltage line and swing over a conveyor belt. The Employer viewed the Grievor's "horseplay" to be an extremely dangerous safety violation and suspended him for the remainder of the shift and for all of the next one. The Grievor denied that he swung on the pipe, but he admitted he had jumped over the conveyor belt. The Union filed a grievance claiming that the Grievor was unjustly suspended. It contended that the Grievor was not engaged in horseplay but was doing what he could to maintain production. As well, it argued that the Grievor should not be disciplined for a rule which was neither well-publicized nor punishable in the past. The Employer submitted that employees were aware that both acts were forbidden, as stated in posted minutes from the Safety and Health Committee. At any rate, an employee should have the common sense not to jump. It stated that even if the Grievor only "jumped", he should be disciplined as that alone was an unsafe act. The Union emphasized that the suspension was specifically for swinging on the electrical conduit, not for jumping and the Employer was not entitled to change grounds.

AWARD: The grievance was allowed in part. The Arbitrator found, on the balance of probabilities, that the Grievor did utilize the conduit pipe, possibly unconsciously, to swing over the conveyor. He was satisfied that the Grievor's actions constituted an unsafe practice and were in violation of posted rules and Section 5(a) of The Workplace Safety and Health Act. As to the Union's argument that the Employer changed the grounds for discipline, the Arbitrator commented that the Grievor indisputably jumped over the conveyor belt and that was a prohibited act which was integrally related to or was included within the grounds initially advanced. Therefore, he found that the Employer did not act prejudicially against the Grievor and was justified in imposing a penalty. However, he ruled that the penalty imposed was too harsh because the Grievor had not previously breached safety rules, was not deliberately dishonest, his motives were unselfish, and no similar penalties were imposed on other employees. In consideration that the Grievor had a disciplinary record, but that the Employer did not have a completely consistent disciplinary policy, he ruled that the Employer was justified in suspending the Grievor without pay for the balance of his shift, but that the added suspension for the next shift was unduly harsh.

FILE NO. AA89-11-012

EMPLOYER: The Rural Municipality of Gilbert Plains

UNION: International Union of Operating Engineers, L. 901

ARBITRATOR: W.D. Hamilton

APPEARANCES: K. Lercher, for the Employer
J. Murphy, for the Union

ISSUES:
1. Work Hours and Shifts 5:3100
2. Temporary, Casual and Part-time Employees 5:1124
3. Wage Guarantees 8:1200
4. Qualifying for Holiday Pay 8:3120
5. Intention of the Parties 4:2100

GRIEVORS: C. Christensen/R. Cole/T. Hrychuk/N. Semchuk

DECISION RENDERED: November 30, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Union alleged that the Employer violated Article 18.04 of the collective agreement which stated that the Employer would "guarantee seasonal and part-time employees with 50 hours of work per week for 20 weeks." Over a six-week period, the Grievors, who were all seasonal employees, missed hours ranging from 29 to 43 hours. The hours were not missed on consecutive days but arose when the Employer, from time to time, sent the Grievors home. As a remedy, the Union sought payment for hours owed as well as for 10 hours statutory holiday pay. The Employer contended that the Grievors were not entitled to the statutory pay because they failed to meet conditions listed in Article 6.02 which required an employee to work the last scheduled shift immediately preceding and succeeding the holiday, and that the employee work all or part of at least 15 days of the 30 days preceding the holiday. As for the obligation under Article 18.04, the Employer argued that it need not be fulfilled in each and every week as it was a guarantee of "global" hours.

AWARD: The grievance was allowed in part. The Arbitrator found that the language of Article 18.04 explicitly expressed a guarantee to seasonal employees for 50 hours of work in each "calendar week" for 20 consecutive weeks, but it was not restricted to assigning ten hours per day being the regular hours under Article 18.01(b). He found that the guarantee could include both overtime or week-end hours. However, he did not agree that the guarantee was global and could be worked over an extended period of time. He also stated that the Employer could include any time off with pay received under other provisions such as sick time, statutory holiday pay, or compassionate leave towards the fulfillment of the guarantee. He also found that the use of the phrase "seasonal and part-time employees" referred only to seasonal employees as contemplated by the agreement. The reference to part-time was another way for the parties to distinguish seasonal employee from a year round employee. As to the entitlement to statutory holiday pay, he concluded that the conditions of Article 6.02 must be met, and nothing in Article 18.04 ousted the operation of the conditions. Because the parties only presented global hours of missed time, he could not award specific amounts of wages owing.

FILE NO. AA89-11-013

EMPLOYER:	The Rural Municipality of Gilbert Plains
UNION:	International Union of Operating Engineers, L. 901
ARBITRATOR:	W.D. Hamilton
APPEARANCES:	K. Lercher, for the Employer J. Murphy, for the Union
ISSUES:	1. Suspension 7:3542 2. Insufficient and/or Careless Work 7:3520 3. Company Rules 4:1500 3. Multiple Penalties 7:4240
DECISION RENDERED:	November 30, 1989
EXPEDITED ARBITRATION:	Yes

CIRCUMSTANCES: The Grievor, who was a Bridge Crew Foreman was suspended for one day for having left steel rods, which were not marked so as to be visible other than in daylight, in two uncontrolled intersections on a municipal road. The Union filed a grievance claiming the suspension was unjust, because the Grievor did not violate a published or known safety rule. It also raised the issue that the Employer had imposed double penalties for the offence, because the Grievor had received a verbal reprimand as a result of the incident, and received the suspension approximately two weeks later. The Employer contended that there was cause for discipline because the Grievor left the municipal road improperly marked and his carelessness constituted a serious safety hazard.

AWARD: The grievance was denied. The Arbitrator found that the Grievor had left the rods in the middle of the road overnight, and given that the roads were passable, this constituted a safety hazard and was a careless decision on his part. The Arbitrator also stated that the absence of written rules on marking roads did not prohibit the Employer from imposing discipline for improper conduct. He did not agree with the Union's claim that the Employer had imposed a double penalty, because he could not regard the conversation the Employer had with the Grievor to have met the test of being a "specific sanction for certain misconduct". It was no more than communicating an expectation of performance to the Grievor. As to the severity of the penalty, he did not find the suspension excessive, because the Grievor did not exercise common sense judgment on a matter of safety where members of the public were involved.

FILE NO. AA89-11-014

EMPLOYER: The Province of Manitoba

UNION: Manitoba Government Employees' Association

ARBITRATOR: W.D. Hamilton

APPEARANCES: D. Cieszynski/R.D. Cram, for the Employer
B. Havelock, for the Union

ISSUES:
1. Personal [Act] Detrimental to Production 7:3570
2. Suspension 7:3542
3. Reasonableness of the Penalty 7:4300
4. Mitigating Factors 7:4400

DECISION RENDERED: November 30, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was employed as a Juvenile Counsellor, was observed by his Supervisor sitting in a chair which was propped up against the wall and he had a pillow behind his back. He was breathing heavily and his eyes were shut. The Supervisor took him by the arm and shook him. The Grievor appeared startled, and the Supervisor accused him of sleeping while on duty. As a result, he was suspended without pay for 10 days for breaching a written policy in which sleeping in the cottages and the use of bedding were prohibited. The Union filed a grievance claiming that the suspension was unjust. The Grievor denied he was sleeping. He explained that he had momentarily closed his eyes due to some eye medication he had taken.

AWARD: The grievance was allowed in part. Based upon the evidence, and the applicable standard of proof, the Arbitrator found that the Grievor was sleeping. As he violated a known and published policy, the Employer was justified in imposing discipline. However, when balancing the Employer's legitimate interests in having Juvenile Counsellors be alert at all time, given the nature of their responsibilities, against the Grievor's lengthy and unblemished record; the likelihood that the Grievor unintentionally fell asleep after he administered the eye drops; the "previous warnings" referred to in the suspension letter were general cautions given to all staff; and his denial that he fell asleep was due to his reluctance to believe that he could doze off, the Arbitrator reduced the suspension to five days.

FILE NO. AA89-11-015

EMPLOYER: Felec Services Inc.

UNION: International Brotherhood of Electrical Workers, Local 1541

ARBITRATOR: W.D. Hamilton

APPEARANCES: K. Lercher, for the Employer
L. Cherniack/D. Shrom, for the Union

ISSUES:
1. Resignation 7:7100
2. Conflict of Interest 7:3330
3. Burden of Proof 7:2300
4. Admissibility of Evidence 3:4000

DECISION RENDERED: November 30, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor, who was employed as a Radician operator at the DEW Line, was the successful bidder on a tender for a company for which the Employer had also performed work. According to the Deputy Area Manager, he told the Grievor that there could be a conflict of interest because an employee was not to work for the Employer and another company at the same time. He testified that when the Grievor said he would have to resign, he suggested that the Grievor could sub-let the contract to someone else but the Grievor responded that as his personal reputation was at stake and due to the amount of time and finances invested, he could not do this but would resign. In contrast the Grievor testified that he was told there was a conflict of interest and was given an ultimatum to either give up the contract or resign. He felt he had no choice because he had to fulfill his obligations under the contract and that he had too much at stake both personally and economically. As a result of the conversation, the Grievor submitted his written resignation giving the required 30 days notice. Upon his return to Winnipeg, and on the date his resignation took effect, the Union filed a grievance alleging that the Grievor was forced to resign and contended that the resignation was not a true resignation because the requisite subjective intent to resign was not present. During the notice period, the Grievor made inquiries and discovered that since the Employer had not bid on the contract, he was not in direct competition with it. Therefore, no conflict of interest existed. It claimed that the Employer's statements were misleading or negligent and as soon as the Grievor ascertained he was not in a conflict of interest position, he filed the grievance. The false premise negated there being a true subjective intent to resign. The Employer argued that the resignation was freely given and therefore both an objective and subjective element for a bona fide quit existed. The letter of resignation was a signed, typed document and remained unrevoked in excess of 30 days. No evidence existed of duress or threats. Whether or not it was correct in its assessment that a conflict existed was irrelevant. In any event, it submitted that a conflict did exist due to the proximity of the other company's worksite to its own station, the contractual arrangements it had with the other company, the Grievor's use of equipment under control of the Employer, and the Grievor's access to relevant data.

The Employer objected to a request by the Union to hear evidence via conference call from a witness who resided in the Yukon. The evidence was allowed subject to the expressed reservations of the Employer as to weight and relevance.

AWARD: The grievance was denied. The Arbitrator accepted the Employer's evidence that the Grievor was presented with the option to sub-let the contract to someone else. He also found the Grievor was not forced to resign under duress, nor did he quit in a heated moment due to anxiety or frustration and later attempt to retract it. Therefore, the assertion that the Grievor was forced to resign and was given an ultimatum was an overstatement. During the entire 30 day notice period, the Grievor did not retract his resignation, did not consult the Union representative, nor did he discuss the matter with any Steward until approximately the last week prior to leaving. The Arbitrator found a continuing and objective manifestation on the part of the Grievor to resign up to and including his leaving the line one month after his initial conversation with the Employer. The Arbitrator did not find that the Employer vitiated the resignation by raising what it perceived to be a conflict of interest. Even if the Employer was wrong in its concern regarding the conflict, the concern was honestly held and its statements could not be construed as negligent misstatement because the principle of misrepresentation does not apply to opinion or forecasting. In any event, the issue of whether the conflict existed was resolved when the Grievor resigned. Therefore, the Arbitrator ruled that the resignation was valid because the Grievor voluntarily decided to quit his employment, and the requisite subjective and objective elements necessary to constitute a valid quit existed.

FILE NO. AA89-11-016

EMPLOYER: Alcatel, ITT Industries of Canada Ltd.

UNION: Canadian Association of Industrial, Mechanical and Allied Workers, Local 1

ARBITRATOR: L. Cherniack

APPEARANCES: S. McArthur, for the Employer
S. Soronow, for the Union

ISSUES:
1. Innocent Absenteeism 7:3210
2. Discharge Distinguished 7:7000
3. Employee Disability 7:3200
4. Reinstatement and Substitution of Penalty 2:1470

DECISION RENDERED: November 30, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievors were both suffering from Carpal Tunnel Syndrome and were receiving Workers Compensation Benefits. One had been off work for 23 months, and the other for 18 months when their employment was terminated. As a result of the terminations, the Union filed grievances alleging unjust termination. The Employer explained that the terminations were a result of their excessive absenteeism, and because neither could provide a clear indication of when they could return to work. During the course of the hearing, it was apparent that the Plant Manager who initiated the termination was not aware that both Grievors were in regular contact with their superiors.

AWARD: The grievances were allowed. The Arbitrator was satisfied that the Employer had established that the Grievors each had an undue absenteeism record. However, from the medical evidence presented, he found that some degree of likelihood existed for their return to work. With regard to the question of whether the prognosis should be made as of the date of the termination or the date of the hearing, the Arbitrator found that the Grievors' medical conditions did not change between the date of the termination and the date of the hearing, and therefore, in these cases the dates considered were not an issue. In addition, they both expressed an interest in returning to work. Therefore, he ordered that both Grievors should be placed back on the list of employees.

FILE NO. AA89-12-001

EMPLOYER:	University of Manitoba
UNION:	University of Manitoba Faculty Association
ARBITRATOR:	M.H. Freedman, Q.C.
APPEARANCES:	C. Suche, for the Employer R. Tonn, for the Union
ISSUES:	1. Fighting, Assault 7:3430 2. Scope of Review 7:4100 3. Mitigating Factors 7:4400 4. Reasonableness of the Penalty 7:4300
DECISION RENDERED:	December 1, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: After an investigation into sexual harassment allegations, the Grievor was suspended indefinitely with pay pending a decision regarding the penalty. Two weeks later, he was suspended for four months without pay. Although the Grievor did not dispute the allegations, the Union filed a grievance claiming that the penalty was too severe. It agreed that his conduct was offensive, but it noted that he did not have direct authority over the complainant, he was not attempting to coerce sexual favours from her, he misconstrued some of the complainant's actions as encouragement, and he did not see his conduct as malevolent at the time. The Employer testified that for the suspension to have any effectiveness and to act as a deterrent, it would have to be substantial and separate the Grievor from his duties. As well, since the Grievor could not resume his teaching duties part way through a term, and his presence was not needed before the end of the first term, the suspension was not to end until the end of December.

AWARD: The grievance was denied. The Arbitrator did not find that the absence of retaliatory conduct by the Grievor to be a factor which mitigated the severity of the penalty if in all other respects the penalty was appropriate. As well, his willingness not to dispute the details because they were essentially correct, did not affect the penalty. He found the Grievor's conduct to be "willful blindness". Over a long period of time and frequently, although sporadically , he engaged in a course of conduct that was unwelcome and unwanted by the complainant. He was told explicitly of her views. The Arbitrator would not accept that this was the innocent flirtation the Grievor characterized his actions as and he was not satisfied that the motives were as innocuous as asserted. The Arbitrator found that the Employer had considered all relevant factors and weighed them in the balance: the impact the suspension would have on the Grievor; the importance of deterrence; and, the impact of the situation on the complainant and the institution in general. He ruled that the penalty imposed by the Employer took into account all proper factors, and was reasonable in the circumstances.

FILE NO. AA89-12-002

EMPLOYER: Deer Lodge Centre Inc.

UNION: Public Service Alliance of Canada

BOARD: P.S. Teskey, Chairperson
D. Strutinsky, Nominee for the Employer
R. Malazdrewich, Nominee for the Union

APPEARANCES: G.D. Parkinson, for the Employer
B. Done, for the Union

ISSUES:
1. Wage Guarantees 8:1200
2. Revision of Classifications and Rates 5:2440
3. Lay-off 6:2200
4. Intention of the Parties 4:2100

GRIEVORS: O. Barth/A. Zebrun

DECISION RENDERED: December 1, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: In 1987, the Grievors, who were Medical Technologists, were reassigned as Laboratory Technologist. Although the classification was lower, their hours of work and rate of pay were maintained as per the Letter of Understanding concerning Over-Range Employees. In April 1989, the Grievors were laid off. Both exercised their bumping rights and accepted vacant positions. In both cases, the negotiated rate of pay for the position was less than their Over-Range rate as a Technologist. The Union filed two grievances alleging that the Employer had violated the Letter of Understanding by not paying the Grievors at the Over-Range rate. According to the Employer, the Over-Range rate only applied as long as the employee remained in the classification occupied at the time they were designated as Over-Range. Since they were being laid off as Medical Technologists, and they had made the choice to accept the lower rated position, the Letter of Understanding no longer applied.

AWARD: The grievances were denied. The Board interpreted the Letter of Understanding to afford protection to the classification held as of April 1, 1983 and not to other classifications which an employee might subsequently hold. It found that it was clearly stated that it applied to "employees who are over the range of the classification in which they are presently employed." It also found that the term "duration of employment" must be read to refer to employment in the classification towards which the preferential treatment should apply, and "classification" must be referred to the classification held as at April 1, 1983. It also stated that anomalies might exist if the Union's proposal were accepted.

DISSENT: R. Malazdrewich, Nominee for the Union. Mr. Malazdrewich did not agree with the interpretation of the Letter of Understanding. He stated that the parties could have easily constructed the clause to specifically define the classification as at April 1, 1983, rather than "presently". As well, since the Letter of Understanding was executed again on February 20, 1989, then the term "presently" referred to that date. In addition, he defined "duration of employment" as the total time employed regardless of the classification.

FILE NO. AA89-12-003

EMPLOYER:	ICG Utilities Greater Winnipeg Gas Company
UNION:	Energy & Chemical Workers Union, Local 681
BOARD:	M.H. Freedman, Q.C., Chairperson R.Whiteway, Nominee of the Employer S. Hart-Kulbaba, Nominee for the Union
APPEARANCES:	K. McLean, for the Employer B. Baker, for the Union
ISSUES:	1. Management Rights 4:2310 2. The Nature of Disciplinary Sanctions 7:4210 3. Management's Duty to Act Fairly 4:2320 4. Changes in Job Function 5:2410
DECISION RENDERED:	December 4, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: After the introduction of small hand held computers which the meter readers used on their routes, the Employer interviewed all meter readers who did not complete their daily assignments. As a result of complaints from several of the employees regarding the interviews, the Union filed a grievance alleging that the Employer had committed acts of harassment, intimidation and denial of union representation. It complained that no notice had been given and the whole atmosphere during the interviews was confrontational because of persistent and repetitive questioning. It contended that the interview process itself went beyond the seeking of information and that the interrogation effectively constituted a disciplinary act. It agreed that the Employer had the right to interview, but that the manner in which the interviews were conducted was totally inappropriate. The Employer claimed that the workers were being interviewed to help improve their daily routine. It was concerned that for several days, the same group of employees were unable to complete their daily assignments subsequent to the introduction of the computers. It submitted that the interviews were conducted on a one on one basis and were not loud or aggressive in nature. It added that as per Article 6.02 of the collective agreement, management had the right to interview its employees regarding their productivity.

AWARD: The grievance was denied. The Board agreed with the Employer that the brief written statements provided did not adequately explain why the routes were incomplete, especially when the employees did not usually have incomplete routes before the introduction of the computers. In addition, it was satisfied that the Employer was clearly entitled to interview the employees. The employees consistently said that they did not remember details or that the information was already in the computer which the Board viewed as an unacceptable and inappropriate response to give a supervisor. The Board held that the level of questioning did not reach the point of interrogation and harassment. It also found that the employees were not disciplined or warned as a result of the interviews. Therefore, it ruled that the Employer did not breach any provision of the collective agreement by conducting the interviews.

DISSENT: S. Hart-Kulbaba, Nominee for the Union. Ms. Hart-Kulbaba held that the interviews were interrogatory. Therefore, she would have concluded that there was harassment which in turn constituted discipline because the essential objective of the interviews was to correct what the Employer deemed to be deficient behaviour.

FILE NO. AA89-12-004

EMPLOYER: INCO Limited

UNION: United Steelworkers of Amercia, Local 6166

ARBITRATOR: P.S. Teskey

APPEARANCES: J.M. Christiansen, for the Employer
D. Brown, for the Union

ISSUES: 1. Insufficient and/or Careless Work 7:3520
2. Procedural Requirements 7:2100
3. Reasonableness of the Penalty 7:4300

DECISION RENDERED: December 4, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: While performing the function of "acid blowing", or filling the supply tanks with sulphuric acid, the Grievor, who was a Filter Operator, did not follow procedure and rather than opening the valve to the empty tank, he opened the valve to the full tank. As a result of his mistake, and because a portion of the overflow pipe was broken and could not contain the acid, it overflowed and three employees were hit by the acid. None of them suffered more than superficial injuries and none required hospitalization or even to be sent home from work. After the incident and in consideration that the Grievor had been counselled six months previously about an incident involving acid blowing continuing during the shift change, the Grievor was assessed two steps in the discipline process. As a result, the Union filed a grievance claiming that the Grievor was unjustly disciplined with respect to receiving a two step disciplinary response. It argued that no penalty should be imposed because the Employer was inconsistent in its discipline for such incidents. It submitted that if the Arbitrator found that discipline was warranted then it argued the imposition of one step would be more sufficient. In addition, it suggested that what had occurred was simply a mistake and that the Grievor was busy during the morning in question and acid blowing was not the primary task in his classification. The Employer submitted that the Grievor had committed a serious breach of proper operating procedures which fully warranted the disciplinary response imposed. It also noted that the Grievor had been reluctant to admit his own wrongdoing.

AWARD The grievance was allowed in part. The Arbitrator found that the Grievor had a clearly defined procedure to follow and, if he had followed it, the incident would not have occurred. He found that the Grievor was negligent, although unintentionally, and was reluctant to acknowledge his own responsibility for the incident. Therefore, he ruled that some discipline was warranted. Although he understood the Employer's logic in considering the previous counselling, he found using a non-disciplinary response as a type of progressive step in order to surpass the one step penalty usually imposed for similar types of misconduct created an anomaly. Therefore, he substituted a one step penalty for the two step penalty.

FILE NO. AA89-12-005

EMPLOYER:	Alltrans Express Ltd.
UNION:	General Teamsters Union, Local 979
ARBITRATOR:	M.H. Freedman, Q.C.
APPEARANCES:	D. Newman, for the Employer D. Lewis/A.R. McGregor, Q.C., for the Union
ISSUES:	1. Suspension 7:3542 2. Production and Attendance Records 7:3322 3. Duration and Loss of Seniority 6:1200
DECISION RENDERED:	December 8, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor, who was a driver, had claimed time for "hook, scale and check equipment" from 8:30 to 9:00 a.m., even though he did not arrive at the yard until 10:00 a.m. As a result, the Grievor was discharged for deliberate falsification of the trip sheet. The discharge was later reduced to a three-month suspension without pay, because the Employer did not feel the notification of the discharge was handled properly and because of the relatively long years of service and good record of the Grievor. The Union filed a grievance alleging that the penalty was still too harsh. It argued that the Grievor did perform some of the check and regardless of how much time he spent doing the check, as per the Employer's standards, he was entitled to be paid so long as he did part of it. The Grievor claimed that he noticed the 1/2 hour overpayment, but thought that it was compensation for underpayment on a previous trip. He also testified that his co-driver for the trip had filled in his time sheet and he simply signed it. The Employer argued that the evidence demonstrated that the Grievor falsified the trip sheet, improperly took money for services not rendered, and then concocted a story to justify his actions. It submitted that the Grievor first testified that he deliberately submitted a false claim form knowing that the Employer would not pay him for it. Subsequently, he testified that he did part of the checking even though his claim was not supported by the evidence. The Employer also submitted that some or all of the Grievor's seniority should be removed as he was more blameworthy than the Employer originally thought.

AWARD: The grievance was denied. The Arbitrator was satisfied that the disposition of the suspension was proper and sustainable by the evidence. The Grievor had submitted a time sheet knowing that it was incorrect as it showed he arrived at the yard an hour or more earlier than he had. He was also satisfied that the Grievor did not perform the check or at least enough of the work that would justify making a claim. While the Employer's policies were loosely enforced, it did not tolerate time sheets being submitted by persons asserting that they were at the yard when they were not, and asserting that they had done work that they had not done. The suspension imposed was serious and costly to the Grievor and the Arbitrator did not find that he should add to the severity of the penalty by removing the Grievor's seniority. Therefore, he ruled that the three month suspension be upheld.

FILE NO. AA89-12-006

EMPLOYER: Canada Safeway Limited

UNION: Manitoba Food & Commercial Workers, Local 832

BOARD: G.C. MacLean, Q.C., Chairperson
R. Simpson, Nominee for the Employer
B. Comstock, Nominee for the Union

APPEARANCES: M. Christiansen, for the Employer
R.D. Ziegler, for the Union

ISSUES:
1. Theft 7:3310
2. Reasonableness of the Penalty 7:4300
3. Employee's State of Mind 7:4424
4. Discharge 7:3542

DECISION RENDERED: December 9, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who worked as a doughnut fryer for twenty years, was shopping at another store of the Employer when a security officer observed her taking a box of diet pills and placing them in a shopping bag. When she did not pay for the pills, she was apprehended outside the store. According to the security officer, the Grievor was very concerned that she would lose her job because she was an employee. The Grievor explained that she had intended to pay for the pills, but had forgotten about them. She explained that she hid them so as to avoid critical comments from her husband. She also explained that she under a lot of stress because the day before she had been informed that she might have cancer, and she was suffering from a migraine headache and had taken medication to combat it. As a result of the incident, she was dismissed for taking the pills without payment. The Union filed a grievance claiming that the penalty was too harsh.

AWARD: The grievance was allowed in part. The Board found that the Grievor's nervous behaviour was not in itself sufficient to establish an intent to shoplift when the other sources of stress were considered. However, putting the pills in the shopping bag did indicate some degree of blameworthiness. Therefore, the Board found that, although her judgement may have been somewhat clouded as a result of her personal problems, it did not consider that the evidence indicated that she was impaired to the extent that she did not recognize the significance for her actions. It also stated that the Grievor did not use her position as an employee to take advantage of the Employer, as she did not take them from her own immediate Employer. As well, in light of her lengthy employment and undisputed good record, and because her actions were not premeditated, the Board found the Grievor's actions could not be regarded as destroying the fundamental employer/employee relationship nor did it impact on her work as a doughnut fryer. Therefore, the Board ruled that the discharge was excessive and substituted it with a seven-month suspension without pay.

DISSENT: R.A. Simpson, Nominee for the Employer. Mr. Simpson viewed the Grievor's actions as "theft" and not as "taking without payment". He noted that she was able to carry out other functions that day without a problem, and would not accept her explanations for her actions as mitigating factors, especially when her immediate reaction when approached by the security officer was that her job was in jeopardy. Finally, he noted that although the Grievor did not steal from the particular store to which she was assigned, that did not affect the application of the Employer's policy on employee theft. Therefore, he would not have reinstated the Grievor.

FILE NO. AA89-12-007

EMPLOYER: ICG Utilities, Greater Winnipeg Gas

UNION: Energy and Chemical Workers Union, Local 681

ARBITRATOR: J. Atwell

APPEARANCES: Not stated

ISSUES:
1. Management Rights 4:2310
2. Alteration of Wages 8:1400
3. Fringe Benefits 8:3000
4. Collective Agreement Limitations 2:3100

DECISION RENDERED: December 10, 1989

EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Employer decided that it would discontinue its long standing practice of issuing monthly bus passes to meter readers. Instead, it decided to use its own vehicles to transport them to and from their routes. The Union filed a grievance alleging that the Employer violated Article 26.01 of the collective agreement because it changed a working condition, or wage rates, without discussion and approval of the Union. It argued that a working condition had been changed, because the employees lost independence with respect to getting to and from their routes, and had lost the use of bus passes during the day. It also submitted that the switch amounted to a change in wage rates, meaning wages in the generic sense, because the passes could be converted into cash. The Employer argued that Article 26.01 had not been violated because the working conditions had not changed, because it had and would continue to provide transportation for employees to and from their assigned routes. It had also raised a preliminary objection to the arbitrability of the grievance. It submitted that the discontinuance of the provision of monthly bus passes was the discontinuance of a work procedure and not a negotiated benefit; and the decision was made under the Management Rights provisions of the collective agreement. Therefore, Article 26.01 was not applicable.

AWARD: The grievance was allowed. The Arbitrator overruled the preliminary objection as he found that whether or not Article 26.01 was applicable was the central issue of the grievance. He found that the term "wage rates" in Article 26.01 did not include indirect compensation as suggested by the Union because as per Article II "wage rates" were those paid to different classes of employees for payment of services rendered. Therefore, he ruled that the discontinuance of monthly bus passes did not constitute a change in wage rates with respect to Article 26.01. However, he did find that because employees were free to choose other means of transportation without forfeiting the bus pass, then this arrangement was similar to a transportation allowance, and was therefore a specific contribution which was a condition under which the employees performed their tasks. Therefore, the Arbitrator ruled that the withdrawal of the bus passes, and the substitution of carpooling constituted a breach of Article 26.01 and ordered the Employer to reissue the passes.

FILE NO. AA89-12-008

EMPLOYER:	ICG Utilities, Greater Winnipeg Gas Company
UNION:	Energy & Chemical Workers' Union, Local 681
BOARD:	M.H. Freedman, Q.C., Chairperson R. Whiteway, Nominee for the Employer P. Moist, Nominee for the Union
APPEARANCES:	K. McLean, for the Employer B. Baker, for the Union
ISSUES:	1. Ancillary Documents 4:1200 2. Unable to Discharge Employment Obligation 7:3220 3. Qualifying for Disability Benefits 8:3320
DECISION RENDERED:	December 11, 1989
EXPEDITED ARBITRATION:	No

CIRCUMSTANCES: The Grievor, who was a gas plant operator, was on long term disability due to a shoulder injury. Eventually, the Employer terminated his employment, because in its judgment, he was sufficiently disabled such that he could not perform his duties, and no light duty position was available on a continuing basis. It advised him to seek Long Term Disability payments directly from the insurer. The insurer had been paying Long Term Disability benefits to the Grievor, because it concluded that he was disabled from performing his own job. However, after 24 months of such disability, the test for disability under the insurance arrangement changed, and related to disability in respect of any kind of occupation. In the insurer's view, the Grievor was not totally disabled to meet its test for eligibility to continue to receive benefits. The Union filed a grievance alleging that the termination was unjust, because the Grievor could not be terminated for innocent absenteeism. It was also grieved the cessation of his long term disability benefits.

AWARD: The grievance was allowed. The Board declared that the Employer could not alter the benefits provided for under the collective agreement by making contractual arrangements with the carrier of the insurance which were inconsistent with, and more restrictive than, the provisions of the collective agreement. No reference, either explicitly or implicitly, had been made in the collective agreement to any arrangement which would limit the Employer's obligation to the employees. The Board viewed the insurance contract as only a means for the financing of the Employer's obligations, and it could not avoid its obligations by asserting that the Grievor was not covered by the insurance it chose to carry. It further stated that the appropriate test for eligibility was the one in the collective agreement and not in the insurance contract which was an ancillary document. The Board also ruled that the Employer could not terminate the Grievor for innocent absenteeism, because the termination interfered with the Grievor's rights to receive benefits under the collective agreement. Therefore, the Board ruled that the termination was unjust and ordered it to continue to pay the benefits that the Grievor was entitled.

FILE NO. AA89-12-009

EMPLOYER: City of Winnipeg

UNION: Winnipeg Association of Public Service Officers

ARBITRATOR: M.H. Freedman, Q.C.

APPEARANCES: M. Samphir, for the Employer
R. Watchman, for the Union

ISSUES:
1. Management's Duty to Act Fairly 4:2320
2. Illness Benefits and Other Rights 8:3300
3. Credited Service for Vacations 8:3220

DECISION RENDERED: December 15, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: In 1959, the Grievor was hired by the "Old" City of Winnipeg. He resigned in August 1965 and immediately took up employment with the Metropolitan Corporation of Greater Winnipeg ("Metro"). He was virtually a new employee, because Metro did not pick up or continue his vacation and sick benefits that he had accrued with the Old City. When the current City of Winnipeg ("New City") was created through legislation in 1972, he became an employee of the New City. His service date with the New City was deemed to be August 1965. In 1976, the New City adopted a policy whereby it would recognized prior service with the Old City to determine vacation and sick leave providing that the immediate predecessor had also recognized the service with the Old City. Applications had to be submitted by the December 31, 1976, and had to include statements from other employees or elected officials that the applicant's service with the Old City had been recognized by Metro for the purpose of calculating annual vacation entitlement. Because the Grievor did not submit his application until January 1988, and because his past service had not been previously recognized by the predecessor municipal employer, the Employer denied his request. The Union filed a grievance claiming that the Grievor received inequitable treatment regarding recognition of past service for the calculation of sick leave and vacation time. The Employer argued that the Grievor was aware of the policy in 1976 and raising his claim 12 years later was inappropriate and therefore he should be estopped because of the time delay. The Union countered that an arbitrator had the jurisdiction to correct a long-standing error of interpretation of the collective agreement. The Employer also contended that it had not treated the Grievor unfairly as all persons who raised similar claims since 1976 had been dealt with on exactly the same basis.

AWARD: The grievance was denied. The Arbitrator could not find any basis for the Union to argue that the collective agreement was being interpreted incorrectly, because the agreement did not contain any provisions dealing with the issue. He concluded that he could not alter the date of service for the purposes of vacation and sick leave credits. The Grievor was not an employee "assumed" or "taken over" by Metro, but one who resigned from one employer and accepted employment from another. Metro did not recognize his prior service and he voluntarily worked for Metro in the full knowledge that his service date was 1965 and not 1959. The Arbitrator did not consider that the Grievor had been unjustly dealt with as he was treated exactly the same as every other civic employee had been treated. Therefore, he ruled that the Grievor was not treated unfairly and the Employer did not breach the collective agreement.

FILE NO. AA89-12-010

EMPLOYER: St. Boniface General Hospital

UNION: Manitoba Food & Commercial Workers, Local 832

ARBITRATOR: D.G. Baizley

APPEARANCES: M. Werier, for the Employer
D. Watts, for the Union

ISSUES: 1. Jury and Witness Duty 8:3600
2. Intention of the Parties 4:2100

GRIEVOR: D.Clark

DECISION RENDERED: December 19, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Grievor was subpoenaed to appear in court as a witness. She was advised by her supervisor that she would be paid for the four hours she would miss as a result of the absence. On the day she was to appear in court, she phoned her supervisor that she would be absent for the entire day. Ultimately, she was paid for the 4 1/4 hours for the afternoon hours missed, but she was not paid for the 3 3/4 hours missed in the morning. The Union filed a grievance alleging that the Employer unjustly denied the Grievor payment for jury duty as per article 26.08 of the collective agreement which provided that an employee who was a subpoenaed witness would be granted a leave of absence with pay "for all scheduled hours". It contended that the language of the article was mandatory and that the only reasonable interpretation of the phrase "for all scheduled hours" referred to all scheduled hours that day or that shift. The Employer contended that the most reasonable interpretation of the article would require it to provide compensation for those scheduled hours which conflicted with the court duties.

AWARD: The grievance was denied. The Arbitrator accepted the Employer's interpretation as the most reasonable in the circumstances. He stated that the application of the provision must be reasonable to allow for travel time, and reasonable preparation time with counsel. In this case, the Arbitrator could not find that the Employer was unreasonable as it had granted a full 1 1/2 hours prior to the appearance time which should have been sufficient to enable the Grievor to have lunch and travel to the court. Therefore, he ruled that the Employer did not misinterpret the collective agreement.

FILE NO. AA89-12-011

EMPLOYER: Burns Meats Ltd.

UNION: United Food & Commercial Workers, Local 111

BOARD: D.G. Baizley, Chairperson
R. Simpson, Nominee for the Employer
S. Hart-Kulbaba, Nominee for the Union

APPEARANCES: K. Lercher, for the Employer
M. Myers, Q.C., for the Union

ISSUES:
1. Company Rules 4:1500
2. Management's Duty to Act Fairly 4:2320
3. Abandonment, Settlement and Withdrawal 2:3230

GRIEVOR: Policy Grievance

DECISION RENDERED: December 21, 1989

EXPEDITED ARBITRATION: No

CIRCUMSTANCES: The Union filed a policy grievance alleging that the Employer's policy requiring female employees to wear yellow and green stripes on their helmets, while their male counterparts did not, was discriminatory and in violation of Article 3 of the collective agreement. The requirement that women employees wear stripes on their helmets was not found in the collective agreement, but was a company rule that had been unilaterally imposed by management. The Employer argued that while the rule treated women employees differently, this differential treatment did not amount to discrimination because no obligations, penalties or restrictive conditions were imposed on them. It also argued that there was no utility in the grievance because the practice ceased over a year before the hearing date. The Union maintained that it was entitled to a declaration that the practice was a breach of the collective agreement to ensure the same issue did not arise again.

AWARD: The grievance was allowed. The Board found that, even though the conduct complained of had ceased, no final resolution of the "dispute" occurred. When the practice ceased eleven days before the preliminary hearing, no acknowledgment was made that the same amounted to a breach of the collective agreement. As to the merits, the Board found that the rule served no legitimate purpose, and the Employer's interests would not be negatively affected by its elimination. Therefore, it ruled that the rule was unreasonable and was in breach of the collective agreement.

DISSENT: R.A. Simpson, Nominee for the Employer. Mr. Simpson could not see the utility in a remedy sought for a practice that had ceased one year earlier as the difference between the parties had been resolved. Therefore, he found that the Union was not entitled to a declaration that there was a breach. As to the merits, he found that the discrimination referred to in Article 3 was based upon Union participation and had no application in the case. In any event, he would have ruled that the Union did not establish that the rule was discriminatory, because the wearing of stripes on their helmets did not impose a burden, obligation or disadvantage upon them or limit access to opportunities, benefits, and advantages available to the male employees. As to the reasonableness of the rule, he ruled that there was no evidence of unequal application of the provisions of the collective agreement. Therefore, the Employer did not breach Article 3.

FILE NO. AA89-12-012

EMPLOYER: Federated Co-operatives Ltd.
UNION: United Food & Commercial Workers
ARBITRATOR: G. Reid
APPEARANCES: B. Sumerlus, for the Employer
K. MacLean, for the Union
ISSUES: 1. Standard of Review of Disciplinary Action 7:5020
2. Training and Familiarization Periods 6:3230
3. Reinstatement 2:1470
GRIEVOR: N. King
DECISION RENDERED: December 22, 1989
EXPEDITED ARBITRATION: Yes

CIRCUMSTANCES: The Grievor, who was employed as a materials handler, was dismissed from his probationary position. The Union filed a grievance claiming that the Grievor was unjustly dismissed, because he was not properly trained for his work. The Employer submitted that the Grievor was given a fair chance to learn the work and that he was not able to demonstrate that he had the capacity to perform the job. The Union did not dispute that the Grievor was not performing his duties adequately. Rather, it contended that he was not treated fairly as he was not given the opportunity to acquire the skills necessary to perform the job. While other probationary employees had received up to two days training with an experienced materials handler, the Grievor was assigned to work with an employee who had only been employed for one to two weeks. As well, during his second week of employment, his immediate supervisor was on holidays and he was not given the proper attention.

AWARD: The grievance was allowed. The Arbitrator found that through a series of misunderstandings, the Grievor did not have the opportunity to acquire the knowledge to perform his job properly as was afforded to other probationary employees. Therefore, he ruled that the Grievor was unjustly dismissed. He ordered that he be reinstated as a probationary employee and receive a probationary period of 20 working days. In addition, he ordered that the Grievor receive two days of training from an experienced staff member.

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